No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL.,
PETITIONERS

v.

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 579 F.2d 238. The opinion of the district court (Pet. App. 77a-93a) is reported at 429 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals (Pet. App. 74a-75a) was entered on March 9, 1978. A petition for rehearing was denied on May 8, 1978 (Pet. App.

76a). On July 28, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 5, 1978, and on August 24, 1978, he further extended the time for filing a petition to October 5, 1978. The petition was filed on that date and was granted on March 5, 1979 (A.33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this case became moot when the individual plaintiff's criminal sentence expired after class action certification had been denied by the district court.

2. Whether the district court abused its discretion in failing, *sua sponte*, to identify and certify an appropriate subclass after the court had properly determined that the plaintiff's claims were not representative of the class that had been proposed for certification.

3. Whether the Parole Commission's parole release guidelines or its decision-making practices under the guidelines violate the Parole Commission and Reorganization Act by failing to give consideration to the length of a prisoner's sentence in parole release determinations.

4. Whether application of the Commission's parole release guidelines to prisoners who were sentenced prior to the effective date of the guidelines is an unconstitutional ex post facto enhancement of criminal sentences.

CONSTITUTIONAL PROVISION, STATUTES, RULES AND REGULATIONS INVOLVED

1. Art. I, § 9, cl. 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

2. The Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, provides in pertinent part:

A. 18 U.S.C. 4203:

> (a) The Commission * * * shall—
>
> (1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;
>
> * * * * *
>
> (b) The Commission * * * shall have the power to—
>
> (1) grant or deny an application or recommendation to parole any eligible prisoner;
>
> (2) impose reasonable conditions on an order granting parole;
>
> (3) modify or revoke an order paroling any eligible prisoner; * * *.

B. 18 U.S.C. 4205:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serv-

ing ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

* * * * *

C. 18 U.S.C. 4206:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines

promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

* * * * *

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing * * *.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

D. 18 U.S.C. 4207:

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

E. 18 U.S.C. 4218(d):

Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.

3. Fed. R. Civ. P. 23 provides in pertinent part:

(a) * * * One or more members of a class may sue or be sued as representative parties on behalf of all only if * * * (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

* * * * *

(c) * * *

(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * * *

(4) When appropriate * * * (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

4. The pertinent portions of the guidelines adopted by the Parole Commission for parole release determinations, 28 C.F.R. 2.20, are reproduced in the appendix to the opinion of the court of appeals (Pet. App. 67a-73a).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, respondent was convicted of conspiracy to commit extortion through the use of his position as a vice squad officer of the Chicago police, in violation of 18 U.S.C. 1951,[1] and of making false declarations to a grand jury concerning his involvement in the extortion scheme, in violation of 18 U.S.C. 1623. On January 25, 1974, he was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and one year's imprisonment on the false declarations count. The convictions were affirmed on appeal. *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Respondent obtained a reduction in his sentence to 30 months' imprisonment (A. 20; Pet. App. 77a & n. 2). The district court ordered this reduction, pur-

---

[1] The conspiracy was alleged to have occurred during 1966 to 1970. *United States* v. *Braasch*, 505 F.2d 139, 141 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

suant to Fed. R. Crim. P. 35, because it concluded that application to respondent of the parole release guidelines (28 C.F.R. 2.20), which had been promulgated by the Parole Commission two months before the initial sentence was imposed, would frustrate the expectation of the sentencing court. *United States* v. *Braasch*, No. 72 CR 979 (N.D. Ill. Oct. 1, 1975), appeal dismissed and mandamus denied, 542 F.2d 442 (7th Cir. 1976).[2]

Respondent then applied for release on parole. On January 13, 1976, his application for parole was denied with the following explanation (A. 5-6; Pet. App. 5a):

> Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines establish by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted.

Respondent's second application for parole was denied for similar reasons on July 7, 1976, and he was continued without further consideration of parole until

[2] Respondent's motion for further relief pursuant to 28 U.S.C. 2255 was denied on December 21, 1976. *Geraghty* v. *United States*, No. 76 C 4215 (N.D. Ill.) (A. 31).

his release from prison on accumulated good time credits (Pet. App. 6a).

2. On September 15, 1976, respondent instituted this civil action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief (A. 1, 3-16; Pet. App. 78a). Respondent alleged that the Parole Commission's guidelines are invalid under the Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, and that they also violate the ex post facto prohibition of the Constitution by authorizing the Commission to make deferred sentencing decisions (Pet. App. 83a-84a).[3] Respondent moved for certification of the case as a class action on behalf of "all federal prisoners who are or who will become eligible for release on parole" (A. 17).

On November 12, 1976, the action was transferred to the Middle District of Pennsylvania, where respondent was then incarcerated (Pet. App. 78a).[4]

[3] Respondent alleged that he was scheduled to be discharged from custody on June 30, 1977 (A. 7, 21). He was released from confinement on that date (A. 32; see page 11, *infra*).

[4] The district court in the District of Columbia construed the action as a petition for a writ of habeas corpus, and thus transferred the case to the Middle District of Pennsylvania pursuant to 28 U.S.C. 1406 and 2255 (A. 31; Pet. App. 78a, 79a & n.3). The district court for the Middle District of Pennsylvania noted that jurisdiction for the declaratory and injunctive relief sought by petitioner ordinarily would rest on 28 U.S.C. 1331 and 1361. The court held, however, that because the relief sought is "in effect, a request for a ruling that [respondent] is entitled to release on parole" (Pet. App.

Respondent moved for summary judgment (A. 28). On February 24, 1977, the district court denied respondent's request for class certification and dismissed the action. The court found class certification inappropriate because "not all members of the [proposed] class have the same interest" in challenging the validity of the parole guidelines (Pet. App. 83a). The court pointed out that some prisoners may find their actual or expected parole release date advanced by virtue of the guidelines and thus would not share respondent's position that the guidelines improperly delay release (*ibid.*).[5] The court also rejected respondent's contention that class certification should be granted merely "to ensure that the legal issues presented" are not made moot by the expiration of respondent's criminal sentence (*id.* at 82a).

80a), habeas corpus is the exclusive remedy (*ibid.*, citing, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973)).

[5] The district court also held that class certification was inappropriate for other claims that would not be shared by all members of the class. Two issues—the classification of respondent's offense as extortion under the guidelines and respondent's access to certain of the Commission's files—were found by the court to relate solely to the circumstances of respondent's individual case (Pet. App. 82a). Similarly, respondent's argument that the guidelines are inconsistent with the provisions of 18 U.S.C. (1970 ed.) 4208(a)(2) (now 18 U.S.C. 4205(b)(2)), under which respondent was sentenced, was found not to have applicability to those members of the proposed class who were sentenced under different statutes (Pet. App. 83a).

Turning to the merits, the court held that the parole guidelines are consistent with the provisions of the Parole Commission and Reorganization Act and that the guidelines do not offend the Ex Post Facto Clause of the Constitution. The court noted that the guidelines are consistent with the requirements of the Act that the parole decision be made "pursuant to guidelines promulgated by the Commission," 18 U.S.C. 4206(a), and be based on the " 'nature and circumstances of the offense *and* the history and characteristics of the prisoner' " (Pet. App. 87a) (emphasis in original). Moreover, the court concluded, the adoption of the guidelines did not effect an ex post facto enhancement of respondent's sentence because parole involves the administrative implementation of the sentence and "is not a form of sentencing or a modification of sentence" (*id.* at 85a n.10, citing *Roach* v. *Board of Pardons and Paroles*, 503 F.2d 1367, 1368 (8th Cir. 1974)).

3. Respondent filed a timely notice of appeal (A. 29). On June 30, 1977, while the appeal was pending in the court of appeals, but before any briefs had been filed, respondent was released from prison as a result of accumulated good time credits after serving a total of 22 months of his sentence. (A. 32). Petitioners then moved to dismiss the case as moot (A. 30). The court of appeals deferred disposition of this motion pending consideration of the appeal on the merits. On March 9, 1978, more than eight months after respondent had been released, the

court of appeals reversed the judgment of the district court and remanded for further proceedings.[6]

a. The court acknowledged that respondent's case became moot when he was released. Because the district court had declined to certify a class action in this case, there was neither a class nor a litigant with a live controversy before the court of appeals. The court stated, however, that if a class action had been certified by the district court, the mootness of respondent's personal claim would not have precluded adjudication on behalf of the class (Pet. App. 20a-21a). And, the court went on, if a proper class *could* have been certified, and the district court erred in failing to do so, the case could be remanded for

[6] On April 28, 1977, after respondent's notice of appeal had been filed (and after the 60-day period for filing a notice of appeal expired (Fed. R. App. P. 4a)), Eliezer Becher, a federal prisoner who had been denied parole, filed a motion in the district court to intervene after judgment, pursuant to Fed. R. Civ. P. 24(a) and (b) (A. 2, 31). The court denied the motion, reasoning that the filing of respondent's notice of appeal had divested the district court of jurisdiction (A. 2, 31). Becher appealed from the denial of his motion to intervene (A. 2); and his appeal was consolidated with this action. After the appeals were argued, but before the court of appeals' decision was rendered, Becher was released on parole. The court of appeals nonetheless remanded Becher's motion to intervene to the district court "for a determination as to the reasons for his failure to intervene earlier and an examination of the potential prejudice, if any, which might result from such intervention" (Pet. App. 11a n.21; citations omitted). Becher has apparently abandoned any interest in the litigation, however, for he failed to pursue his motion to intervene in the district court proceedings on remand. See also note 13, *infra*.

class certification to preserve jurisdiction (*id.* at 28a).

With regard to the class certification question, the court of appeals agreed with the district court that the proposed class was too broad and that respondent's interests might conflict with those of other class members (Pet. App. 29a, 31a-32a). The court held, however, that appropriate subclasses may exist and that the district court erred by not considering, *sua sponte*, the certification of such subclasses (*id.* at 32a). The court accordingly reversed the denial of class certification and remanded for the "evaluation of the proper subclasses" (*ibid.*).[7]

b. Stating that a remand for consideration of class certification would produce an improvident dissipation of judicial effort if the district court had properly disposed of the merits of the case (Pet. App.

[7] The court held that the district court had jurisdiction in this case under 18 U.S.C. 4218(c) and the Administrative Procedure Act, 5 U.S.C. 701-706. But because the complaint challenges not the manner in which the guidelines were promulgated but their substantive validity, 18 U.S.C. 4218(c) provides neither jurisdiction nor any substantive remedy. To the contrary, 18 U.S.C. 4218(d) insulates release decisions from judicial scrutiny. Moreover, this Court held in *Califano* v. *Sanders*, 430 U.S. 99 (1977), that the APA is not a jurisdictional statute. We have not challenged the jurisdictional holdings of the court of appeals, however, because respondent's allegation of jurisdiction under 28 U.S.C. 1331 is sufficient in this case. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n.6 (1978). (Moreover, we agree with the court of appeals' holding (Pet. App. 7a-9a) that the case is not properly viewed as one in habeas corpus; the class does not seek immediate release from prison.)

32a-33a), the court of appeals decided "to consider the merits of [respondent's] claim" (*id.* at 33a). The court noted that the Commission has admitted that no weight is given to the length of a prisoner's sentence either in determining the range of customary release dates under the guidelines or in making individual parole determinations (*id.* at 36a).[8] The court concluded that this is impermissible, because the length of sentence was intended to be a relevant factor in the parole process under the Parole Commission and Reorganization Act. Moreover, the court indicated that if the guidelines are applied in a way that excludes consideration of the "individual facts of each case" (Pet. App. 34a, 45a), they would fail to conform to the intent of the Act that each parole determination be based, in part, on the severity of the prisoner's offense (*id.* at 45a).[9]

The court further held that if the guidelines are applied to prisoners sentenced before their effective date, and if they deprive any prisoner "of the possibility of a substantially more lenient punishment" that would have resulted from the previously applicable parole procedures (Pet. App. 58a), then the guidelines, as applied, would violate the Ex Post

[8] Of course, the minimum and maximum sentence lengths established by the sentencing court (18 U.S.C. 4205(b)(1), (2)) determine the period during which the Commission has paroling discretion. See also 18 U.S.C. 4205(a).

[9] The court also suggested that if the Act permits the Commission to disregard sentence length in the parole decision-making process, the statute may unconstitutionally infringe the judicial sentencing function (Pet. App. 46a-50a).

Facto Clause (*id.* at 64a-65a). The court of appeals directed the district court to determine on remand whether the facts reveal that the Commission's guidelines fail to give consideration to sentence length and result in enhanced punishment for prisoners who were sentenced prior to the guidelines' effective date (*id.* at 65a, 66a).

4. After the petition for a writ of certiorari was filed, respondent's counsel filed a motion on November 6, 1978, to substitute or add five additional parties as respondents in this Court, or, in the alternative, to permit the additional parties to intervene as members of the putative class. In granting certiorari, this Court deferred ruling on this motion until the hearing of the case on the merits.[10]

SUMMARY OF ARGUMENT

I

Respondent was released from prison while the case was pending on appeal. The court of appeals recognized that his challenge to the parole guidelines thus became moot. The court also concluded that the

[10] Counsel for respondent filed a similar motion in the district court on November 3, 1978. As we noted in our petition (Pet. 22 n.16), the mandate of the court of appeals was issued to the district court on May 16, 1978. In accordance with the directions of the court of appeals, the district court held a hearing on the class certification issue, but it did not rule on the certification motion or on the motion to add parties plaintiff. On March 15, 1979, following this Court's order granting certiorari, the district court issued an order staying all further proceedings in that court.

district court had correctly declined to certify the class respondent had proposed. The court nonetheless concluded that the case was not moot. The court reasoned that certain subclasses of the proposed class are "certifiable" (even though respondent had not sought their certification) and that if they are certified on remand and if "a factually concrete legal controversy continues to exist, * * * the constitutional *power* of a court over the case remains" (Pet. App. 24a; emphasis in original).

This Court consistently has held, however, that "it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977), quoting *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975). Unless there is a live controversy based on the claim of either a named litigant or a duly certified class, the case lacks the concreteness and adversarial nature that Article III requires. A properly certified class possesses a " 'personal stake in the outcome of the controversy' " and thus satisfies Article III requirements in a case in which the claims of the named litigants have become moot. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). But where the class has not been certified and the claim of the named litigant expires, there is no litigant before the court with a personal stake in the outcome: the case is moot. And the certification of a class thereafter is impermissible, because there is no judicial power to exercise in moot cases.

This is not one of the narrow category of cases where a class may be certified despite the expiration of the named plaintiff's grievance. A certification under these circumstances is appropriate only when the claim is "by nature temporary" and it is unlikely that any individual claim would survive "long enough for a district judge to certify the class." *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975). In such cases the plaintiff can continue the suit whether or not a class is certified. But respondent's legal claims are not transient in nature; they can be adjudicated fully on behalf of a prisoner or a properly certified class of prisoners in another lawsuit.

Respondent's counsel has proposed to cure the jurisdictional defect in this case by moving for the addition or intervention of new parties in this Court. Because the case is moot, however, this Court has no power to grant the motion to intervene. There is no pending case or controversy and thus nothing into which new parties can enter. Intervention cannot breathe new life into an action that is no longer justiciable. New litigants with live claims must file their own actions in a district court.

II

While agreeing with the district court that the proposed class—consisting of all federal prisoners eligible for parole--was too broad, the court of appeals held that the district court abused its discretion under Fed. R. Civ. P. 23(c)(4) by failing, *sua sponte*, to consider the creation and certification of

appropriate subclasses. But Rule 23(c)(4) does not direct the district court to act on its own initiative to construct subclasses when the proposed class is overbroad, and it would be inconsistent with basic principles of adversary litigation to construe the Rule to impose such a requirement.

The class proponent has the burden of establishing the propriety of class action certification, and he does not satisfy this responsibility "by simply affixing the class action label to a suit and depositing it with the clerk." *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 999 (5th Cir. 1978) (en banc). Respondent essentially did no more than that in this case: he did not propose the creation of subclasses in either the district court or the court of appeals. There is no basis for excusing this failure to propose subclass certification by imposing an advocate's duty on the district court instead. Because the district court did not err, it is appropriate to dismiss this case even if this Court accepts the court of appeals' approach to mootness.

III

The court of appeals ruled that the Parole Commission and Reorganization Act requires the Commission, in formulating guidelines for the exercise of paroling discretion and in making parole decisions in individual cases, to give substantial weight to the sentence imposed by the court. Nothing in the language or the history of the Act supports such a requirement.

Section 4206, which establishes the criteria to be considered by the Commission, does not refer to sentence length. The Commission may release a prisoner who is eligible for parole if "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner * * * release would not depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare." These broad criteria form the basis of the guidelines adopted by the Commission. The guidelines reflect these criteria, and there is no basis for concluding that they are invalid because they do not also automatically give weight to the length of the sentence a particular judge imposed.

The legislative history reveals that Congress was aware of the Commission's use of guidelines based on offense severity and offender characteristics. Congress endorsed the Commission's practice, in order to reduce the effects of sentencing disparity and to achieve a fair and consistent application of parole discretion. Consistency is best achieved by giving weight to the nature and seriousness of the offense under uniform standards, rather than through the perspectives of hundreds of district judges. Remarks made during the debate on the legislation, and numerous references in the Conference Reports, express specific approval for the continued use of the guidelines that the Commission had adopted prior to enactment of the new Act. Moreover, the history of the Act makes clear that the parole decision in individual cases is committed to the discretion of the

Commission and "that the weight assigned to individual factors (in parole decisionmaking) is solely within the province of the (Commission's) broad discretion." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 28 (1976); H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 28 (1976).

IV

The court of appeals stated that the guidelines appear to restrict the broad discretion that the Commission previously had exercised in its parole decisions and that, by unduly structuring the parole process, the guidelines deprive prisoners "of the possibility of a substantially more lenient punishment" (Pet. App. 58a). The court reasoned that "the possibility of a substantially more lenient punishment" was a part of each prisoner's sentence prior to promulgation of the guidelines, and that depriving prisoners of this possibility would constitute increased punishment in violation of the Ex Post Facto Clause.

The court's analysis is flawed in two major respects. First, application of the parole guidelines to previously sentenced prisoners does not deprive them of any pre-existing right or impose any additional punishment. The guidelines do not affect the maximum or minimum term of imprisonment that a prisoner may be required to serve. The sentence imposed by the court, in combination with statutory provisions for mandatory release, determines that. Moreover, both before and after adoption of the guidelines, prisoners had no right to release on parole at any particular time; instead, prisoners simply become "eligible" for parole. The Commission had and has discretion to grant or deny release to eligible prisoners. The Commission's guidelines are an exercise, rather than a reduction, of its discretion. They thus are not an ex post facto law.

Moreover, the guidelines do not remove the possibility that a substantially more lenient punishment may result for individual prisoners. By providing broad ranges of customary release dates for various categories of offenders and offenses, the guidelines do not remove the possibility that a parole decision will be made for an earlier (or later) release date whenever the circumstances warrant. 28 C.F.R. 2.20 (b), (c), (d), (e), (g).

ARGUMENT

I

THIS CASE BECAME MOOT WHEN RESPONDENT WAS RELEASED FROM PRISON

A. The Claim Of Respondent Became Moot on June 30, 1977

In every suit invoking the authority of the federal judiciary, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). The absence of judicial authority " 'to review moot cases derives from [this] requirement of Article III * * *.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), quoting *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). See also

Powell v. *McCormack*, 395 U.S. 486, 496 n.7 (1969); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).[11] To be justiciable, a suit " 'must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *.' " *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246. Courts may not render advisory opinions on abstract question of law, *Hall* v. *Beals*, 396 U.S. 45, 48 (1969), or decide moot controversies "that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.

Respondent's challenge to the guidelines of the United States Parole Commission unquestionably became moot on his release from prison at the end of his term of imprisonment.[12] As this Court stated in *Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975), "it is plain that [a former prisoner] can have no interest whatever in the procedures followed * * * in granting parole." Because respondent "no longer has any interest affected by [the challenged] policy" (*ibid.*), and because "there is no demonstrated probability" that respondent will again be subject to the

[11] See also *Sibron* v. *New York*, 393 U.S. 40, 50 n.8 (1968) (the question of mootness "goes to the very existence of a controversy for us to adjudicate").

[12] In order to satisfy the requirement of Article III, " 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 401, quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). See also *County of Los Angeles* v. *Davis*, No. 77-1553 (Mar. 27, 1979), slip op. 6; *Kremens* v. *Bartley*, 431 U.S. 119, 128 (1977).

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challenged parole procedures (423 at 149), his claim is moot.[13] See also *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 129 (1975).

B. Because The District Court Had Denied The Request To Certify The Case As A Class Action, The Entire Case Became Moot When Respondent's Claim Became Moot

The court of appeals concluded that, even though respondent's claim became moot before it had rendered a decision, this "does not automatically deprive [the] court of jurisdiction over the cause of action asserted by the class" (Pet. App. 18a). The court emphasized that, if a class "had been properly certified" (*id.* at 19a), the constitutional case or controversy would have survived the mootness of the claim of the class representative. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Although the court conceded that it had before it "neither a 'live' plaintiff nor a properly certified class" (Pet. App. 21a), it concluded that if

[13] For the same reason, the motion to intervene filed by Eliezer Becher in the district court (see note 6, *supra*) is moot. His release on parole prior to the court of appeals' decision deprived him of any litigable "interest whatever in the procedures followed by petitioners in granting parole." *Weinstein* v. *Bradford*, *supra*, 423 U.S. at 148. Moreover, this case does not involve any challenge to conditions imposed on the grant of parole, or other collateral consequences of parole, that might afford a basis for continuing jurisdiction. See *Scott* v. *Kentucky Parole Board*, 429 U.S. 60, 62 (1976) (Stevens, J., dissenting). Instead, respondent's interest in this case was based only on his concern that the guidelines improperly restricted his ability to obtain parole.

the class was "certifiable" (*id.* at 21a n.43), and if "a factually concrete legal controversy continues to exist, * * * the constitutional *power* of a court over the case remains" (*id.* at 24a; emphasis in original). The court stated that it was appropriate to exercise this power in this case because the questions raised could be " 'capable of repetition, yet evading review' " for some prisoners with short sentences (*id.* at 26a), because respondent's attorneys have "undertaken this litigation on a class-oriented basis [and] [t]here is no indication of any diminution of vigor in their efforts" (*id.* at 27a), and because a contrary holding would "effectively immunize from review such adverse class determinations" (*ibid.*).

The decision of the court of appeals is based on an incorrect interpretation of the decisions of this Court and the principles underlying the mootness doctrine.

1. *A court may not "revive" a moot case*

a. When respondent's claim became moot in 1977 no class had been certified. After the denial of class certification respondent was the only party before the court, and respondent's claim was the entire case. When respondent's claim became moot, the whole case became moot. And when the whole case became moot, judicial power under Article III of the Constitution ended. A court consequently had no power to consider the certification of a class in order to "revive" the action. Even the certification of a class is the exercise of judicial power, and without the

existence of a case or controversy there is no judicial power to exercise. A court has no greater power to certify a class in a case without a plaintiff than it has to certify a class in a case that has never been filed, or a case (brought solely by an attorney) that never had a plaintiff. The fact that the case here was live at one time gives the court no additional power once the case becomes moot. Once respondent's claim became moot, then, the court had no option except to dismiss the action.

This submission is supported by several decisions of this Court. On every occasion that the Court has concluded that the certification of a class action forestalled mootness, it has pointed out that the judicial power to certify the class was exercised while the claim of the representative plaintiff still presented a case or controversy. See *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977). As the Court summarized the governing principle, a case becomes moot as soon as the claims of the named litigants become moot "unless [the case] was duly certified as a class action" while the named plaintiffs had a live controversy with the defendants. *Board of School Commissioners* v. *Jacobs*, *supra*, 420 U.S. at 129.

Consistent with "firmly established requirements" under Article III of the Constitution, there must be a "named plaintiff who has * * * a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23 * * *." *Sosna* v. *Iowa*, *supra*,

419 U.S. at 402.[14] Unless there is a live controversy based on the claim of either a named litigant or a "duly certified" class, the case lacks the concreteness and adversarial nature that is requisite to the maintenance of jurisdiction by federal courts. *Ibid.*; see also 419 U.S. at 412 (White, J., dissenting); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976); *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974). Where the class has not been certified and the claim of the putative class representative becomes moot, the case is moot because a decision "cannot affect the rights of litigants in the case before [the court]." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.[15] And "it is only a 'properly certified' class that may *succeed to* the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, *supra*, 431 U.S. at 132-133; emphasis added. Here there is no plaintiff with a live, adversary position to which a class could succeed.[16] Thus, as the Court stated in *Pasa-*

[14] "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, citing, *e.g.*, *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

[15] See also *Development in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1464-1465 n.57 (1976).

[16] Even when a class has been "duly certified," the case becomes moot on the termination of the claims of the named litigants if subsequent developments require any alteration in the definition of the class. *Kremens* v. *Bartley*, *supra*, 431 U.S. at 132. If classes cannot be substantially altered after the claims of the representative become moot, surely they cannot be created from scratch.

dena City Board of Education v. *Spangler*, *supra*, 427 U.S. at 430, a "case would clearly be moot" if the claims of the named litigants are moot and "there has been no certification of any * * * class * * *."

b. The court of appeals reasoned that these decisions "simply point to *certifiability*, not actual certification, as the crucial question" for determining whether the case becomes moot on the expiration of the named litigants' claims (Pet. App. 21a n.43; emphasis in original). But this distinction ignores both the facts and the reasoning of this Court's decisions.

For example, in *Board of School Commissioners* v. *Jacobs*, *supra*, the plaintiffs, seeking to represent a class of school children, filed their suit as a class action. A class of school children surely was "certifiable"; more than that, it was actually certified by the district court. 420 U.S. at 129-130. Both the district court and the court of appeals treated the case as a certified class action. But this Court concluded that the certification was defective for technical reasons. Then, because the class had not been "duly" (*id.* at 129) or "properly" (*id.* at 130) certified, and the claims of the individual plaintiffs had become moot, the Court held that the complaint must be dismissed. The Court did not suggest that the "certifiability" of the class was relevant or that the case could have been revived by recertification in the

district court using proper procedures. It held, to the contrary, that there was no continuing Article III case or controversy and that dismissal was the only open course.

Pasadena also was brought as a class action on behalf of school children. The district court treated the case as a class action from the beginning but never formally certified a class, although certification unquestionably would have been proper (427 U.S. at 430). As in *Jacobs*, by the time the case reached this Court the representative plaintiffs had been graduated from school. As in *Jacobs*, the Court concluded that there was no continuing case or controversy between the private plaintiffs and the defendants.[17] Once more, there was no hint that the case or controversy could be revived by a belated certification of the class.[18]

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[17] In *Pasadena* the Court held that mootness was avoided only by the intervention of the United States as a party plaintiff. 427 U.S. at 430, 431. The United States intervened in the case before the claims of the named individuals became moot. See *Spangler* v. *United States*, 415 F.2d 1242, 1243 (9th Cir. 1969).

[18] In *Weinstein* v. *Bradford*, *supra*, the Court held that the case became moot as soon as the prisoner was released on parole. A class of prisoners would have been "certifiable," but the Court did not suggest that such a class should be constructed. If the scope of Article III jurisdiction turned on whether a class was certifiable, *Weinstein* would not have been moot, because the case was brought as a class action. Certification was denied, and the prisoner did not challenge the denial on appeal. The Court treated the case as if a class allegation had never been made.

Both *Jacobs* and *Pasadena* proceeded in the lower courts as class actions, yet they became moot because the class had not been "duly" certified. Surely there is no reason to conclude—as the court of appeals held here—that mootness would have been avoided in those cases if certification had been denied. It would be bizarre to hold that a case becomes moot (on the expiration of the named plaintiff's claims) if a proper class was certified with defective procedures, but that a case survives if class certification was denied.

In *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 755, the Court emphasized the necessity for "a properly certified class action" to fulfill Article III requirements in a case in which the claims of the named litigants are moot. The Court stated that there must be a party before the court with a "personal stake in the outcome of the controversy" to assure a sharpened and concrete presentation of the issues. *Ibid.*, quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Where the claim of the putative representative has become moot and class certification has been denied or not yet addressed, there is no cognizable litigant before the court.[19] It is the class members who are cognizable litigants when the class has been certified. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 756. Where the class has not been certified, however, there are no class members before the court possessing a "personal stake in the out-

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[19] The denial of class action certification "strip[s the case] of its character as a class action." Advisory Committee's Note on the 1966 Amendment to Rule 23, 28 U.S.C. App., page 430.

come." See *id.* at 754 n.6. That is why it is "only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley, supra*, 431 U.S. at 133, quoting *Board of School Commissioners* v. *Jacobs, supra*, 420 U.S. at 128. As the Ninth Circuit stated in *Vun Cannon* v. *Breed*, 565 F.2d 1096, 1099 (1977), "in the absence of a properly certified class, the representative plaintiff whose claim has become moot is himself without a litigable grievance, and the person or persons on whose behalf he seeks to continue the litigation has or have not yet achieved jurisprudential existence. There being no adversary necessary for the creation of a constitutionally required case or controversy, jurisdiction is lacking." Accord, *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978).[20]

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[20] See also *Inmates* v. *Owens*, 561 F.2d 560 (4th Cir. 1977); *Lasky* v. *Quinlan*, 558 F.2d 1133 (2d Cir. 1977); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (2d Cir. 1976); *Napier* v. *Gertrude*, 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977).

In *Winokur* v. *Bell Federal Savings & Loan Ass'n*, 560 F.2d 271 (1977), cert. denied, 435 U.S. 932 (1978), the Seventh Circuit held that named plaintiffs whose individual claims were moot could not appeal the denial of class certification by the district court. The court held that, because no litigant with a live controversy existed in the case, the court could not exercise jurisdiction "even to reverse the class action determination and thus instill a live controversy into the action." 560 F.2d at 276. In *Susman* v. *Lincoln American Corp.*, 587 F.2d 866 (1978), the Seventh Circuit held that its decision in *Winokur* does not apply where, because of the payment of the named representatives' claims and the dismissal of their action, the district court lacked a "reasonable opportunity to consider and decide" a class certification motion." While the question is not presented here, it is possible that in a situation where the class opponent has undertaken a systematic course of avoiding class litigation by paying the claims of individual litigants promptly on the filing of their federal actions, the *Susman* decision is consistent with *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The decision of the Fifth Circuit in *Roper* v. *Consurve, Inc.*, 578 F.2d 1106 (1978), cert. granted, No. 78-904 (Mar. 5, 1979), however, appears inconsistent with *Gerstein*. In *Roper* there was time to rule, and the district court did rule in denying certification. The court of appeals held in *Roper* that payment of the claims of the class representatives following the denial of class certification never makes a case moot. 578 F.2d at 1111.

2. No case in this Court has allowed class certification to "relate back" to overcome mootness when the initial claim would not inherently evade review

In concluding that the "constitutional *power* of a court over the case remains" (Pet. App. 24a; emphasis in original) even though no class has been certified and the claims of the named litigants are moot, the court of appeals relied on *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). The court's reliance on those decisions is unwarranted.[21]

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[21] *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), also does not support the judgment below. In *Baxter* the Court refused to treat the case as a class action where the certification requirement of Rule 23 had not been complied with. The Court held, however, that another prisoner who had intervened as a named plaintiff could raise the claims on his own behalf. 425 U.S. at 310 n.1. Nothing in that case suggests that the intervention occurred after the mooting of the plaintiffs' claims. The action was commenced in November 1970; the last of the original plaintiffs was paroled "two years later"; and the

a. In *Sosna* v. *Iowa*, *supra*, the Court held that a case is not necessarily moot, even though the claims of the named plaintiffs have expired, if the case was certified as a class action before the individual claims became moot. 419 U.S. at 402. The Court also stated in *Sosna* that a case may not be moot even though the class was certified after the named litigants' claims expired if "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. Where a claim is "by nature temporary," and it is unlikely that any individual claim would survive "long enough for a district judge to certify the class," *Gerstein* v. *Pugh*, *supra*, 420 U.S. at 110 n.11, the claim may be " 'capable of repetition, yet evading review.' " When the grievance is fleeting, the Court has stated, the class certification may be said to " 'relate back' to the filing of the complaint" for purposes of determining jurisdiction. *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11.

The "relation back" rule applies only when the claim is so transient that review is otherwise unavailable. Cases "capable of repetition but evading review" survive whether or not a class is certified. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). In such circumstances, because the named plaintiff's claim itself may be adjudicated, it simply makes good sense to allow the class action to

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intervenor entered the case in July 1972. See 425 U.S. at 311 n.1.

go forward. See *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978) (challenge to judicial review of exceptions to master's proposals in juvenile proceedings); *Gerstein* v. *Pugh*, *supra* (challenge to legality of pretrial detention).[22]

The court of appeals did not hold that this case falls within this narrow exception as a case "so transitory that mootness inevitably intervenes before the District Court can 'reasonably be expected to rule on a certification motion.' " *Boyd* v. *Justices of Special Term*, 546 F.2d 526, 527 n.2 (2d Cir. 1976), quoting *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11. It could not have done so. Many prisoners serve lengthy terms of confinement. As the experience with collateral attacks on convictions shows, there is often time for numerous challenges to be raised and adjudicated during a single term of imprisonment. Respondent was sentenced in January 1974 and was not released until June 1977. He had ample time to wage campaigns against the parole rules (and against

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[22] See also *Ahrens* v. *Thomas*, 570 F.2d 286, 288-289 (8th Cir. 1978) (same); *Marcera* v. *Chinlund*, 565 F.2d 253 (2d Cir. 1977) (same); *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 333 (6th Cir. 1978) (right to prompt hearing to contest denial of benefits); *Basel* v. *Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (challenge to denial of benefits pending hearing on refusal to renew); *Zurak* v. *Regan*, 550 F.2d 86, 91-92 (2d Cir.), cert. denied, 433 U.S. 914 (1977) (procedural rights relating to conditional release of prisoners eligible for such release after 60 days); *Williams* v. *Wohlgemuth*, 540 F.2d 163, 167 (3d Cir. 1976) (eligibility for emergency assistance relief); *McGill* v. *Parsons*, 532 F.2d 484 (5th Cir. 1976) (pretrial detention); *Jones* v. *Diamond*, 519 F.2d 1090, 1097-1098 (5th Cir. 1975) (same).

the convictions as well) before his release, and the district court in fact ruled on both the class certification question and the merits of the case before it became moot.[23]

But the court of appeals concluded that this Court's recognition of an exception to ordinary mootness rules for transitory actions that are "capable of repetition, yet evading review" means that the Court also has rejected the general principle that litigation becomes moot if the class has not been certified before the claims of the individual litigants expire. The court of appeals reasoned (Pet. App. 22a, 24a) that *Gerstein* stands for the proposition that jurisdiction over

[23] The court of appeals suggested that this case "shares many characteristics" with cases that are "capable of repetition, yet evading review" (Pet. App. 26a). But this suggestion is unsupportable. *Weinstein* v. *Bradford, supra,* unequivocally establishes that claims relating to the parole release system are not in this category. There is no basis for concluding here that persons imprisoned in federal penitentiaries are not likely to be in "custody long enough for a district judge to certify the class." *Gerstein* v. *Pugh, supra,* 420 U.S. at 111 n.11. Because only prisoners sentenced to a term exceeding one year are eligible for parole in the federal system (18 U.S.C. 4205(a), (b)), it follows that most, if not all, individual claims concerning the parole guidelines will persist long enough to provide the district court an opportunity to rule on a class certification motion. (Fed. R. Civ. P. 23(c)(1) directs district courts to rule on the certification question "[a]s soon as practicable after the commencement of [the] action.")

In this case, almost a full year elapsed between respondent's second denial of parole and his release from custody. The district court thus had ample time to rule—and it did rule—on respondent's certification request. Moreover, as the court of appeals conceded (Pet. App. 26a), "some prisoners will retain their grievances long enough to achieve appellate review."

the case continues even though the claims of the representatives are moot and no class has been certified, but that courts have discretion to accept or decline jurisdiction in such cases.

The court of appeals' reasoning neglects both the basis of the *Gerstein* rule and the course of this Court's decisions explaining that rule. The adjudication of individual claims that have expired but are "capable of repetition, yet evading review" is based on the "demonstrated probability" (*Weinstein* v. *Bradford, supra,* 423 U.S. at 149) of recurring uncorrected injury. This probability becomes substantial in a case such as *Gerstein* where the "individual could * * * suffer repeated deprivations" if neither he, nor anyone else, could obtain appellate review of the claim. 420 U.S. at 110 n.11. The critical fact in *Gerstein* was not simply that someone may suffer injury again. What was critical in *Gerstein* was that, if the claim is so inherently transitory that even a class certification motion cannot reasonably be decided before the claim expires, there is a "demonstrated probability" that the claim may escape review not only in the first case but in every other case as well. Although the probability that the claim would recur for the individual litigant in *Gerstein* may not have been demonstrably high, the probability that the claim would escape review by that individual should it recur in the future, or by anyone else who might suffer similar injury in the interim, was very high indeed. In this situation, the individual litigant has a " 'personal stake in the outcome' " (*O'Shea* v.

Littleton, 414 U.S. 488, 494 (1974)). That prospect of repeated, uncorrectable injury supplies the constitutional case or controversy. Once the class action is certified in such a case, the interests of the class members support continued jurisdiction over the case.[24] See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 754-756. *Gerstein* thus states a "narrow" exception to the principle that the class must be certified before the individual claims expire; it does not reverse the rule.[25] 420 U.S. at 110 n.11.

In the present case, however, it is undisputed that respondent's legal claims can be adjudicated fully on behalf of a properly certified class in another lawsuit. There is thus no basis for a conclusion here that a substantial probability of recurring, uncorrectable injury exists, and *Gerstein* does not support respondent.

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[24] This analysis is not inconsistent with the rule that a plaintiff whose claims are moot may not represent the class at certification, see *Bailey* v. *Patterson*, *supra*, 369 U.S. at 32-33. Instead, it recognizes that, in these circumstances, the individual's substantial concern that the potentially recurring conduct would escape review at the behest of himself and all others if a class is not certified provides him with a sufficiently concrete interest to represent the class of persons similarly situated at certification.

[25] If it did, then *Board of School Commissioners* v. *Jacobs*, *supra*—which was decided the same day as *Gerstein*—was in error. The Court held in *Jacobs* that a case became moot on the termination of the named litigants' claims when "inadequate compliance" with the certification procedure of Rule 23 led to the absence of a "duly certified" class.

b. The court of appeals also erred in its reliance on *United Airlines, Inc.* v. *McDonald*, *supra*. That case did not discuss or expressly consider any question of mootness. Rather, the Court held that a post-judgment application for intervention by a putative class member was timely under Fed. R. Civ. P. 24 when it was filed within the period during which the named plaintiffs could have taken an appeal from the denial of class certification.

It is true that the Court stated that, on the facts of *McDonald*, the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs * * *." 432 U.S. at 393.[26] But the Court was not concerned with named plaintiffs whose claims had become moot. Although "[t]he settlement of an individual claim typically moots any issues associated with it" (432 U.S. at 400 (Powell, J., dissenting)), the Court did not regard the "settlement" in *McDonald* as having that effect (*id.* at 393 n.14):

> The characterization of the resolution of the * * * action as a "settlement" could be slightly misleading. It is of course true that opposing counsel agreed upon a disposition that resulted in dismissal of the complaints. But that agreement came only after the District Judge had granted motions by some plaintiffs for partial summary judgment, and there was never any question about United's liability in view of [a previous private action that had established liability]. All that remained to be determined

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[26] The Court stated that United Airlines had conceded this much. *Ibid.* But see *id.* at 400 (Powell, J., dissenting).

> was the computation of backpay, and the guiding principles for that computation had been established in [the previous private action]. The "settlement" ultimately reached merely applied those principles to the claims in this case.

The Court apparently concluded in *McDonald* that what had been labeled as a "settlement" was the result of and equivalent to a judgment on the merits in favor of the named plaintiffs. This saved even the individual claims from mootness.[27]

The prevailing party in a case does not lose his personal stake in a controversy merely because he has prevailed. See *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939). Many collateral issues—such as interest, attorneys' fees, and execution of the judgment—may remain. The prevailing party loses his role as an interested adversary only after he has obtained all the relief he sought and there are no adverse findings with any collateral signifiance. 9 *Moore's Federal Practice* ¶ 203.06, at 716-717 (2d ed. 1975); see *Aetna Casualty and Surety Co.* v. *Cunningham*, 224 F.2d 478 (5th Cir. 1955).

[27] "A payment of a judgment is not necessarily a bar to appeal. When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise and settle a disputed claim, an appeal may be foreclosed, but, under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment." *Gadsden* v. *Fripp*, 330 F.2d 545, 548 (4th Cir. (1964) (footnote omitted). See also *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972).

If an otherwise-prevailing party has suffered because of an adverse class action determination, he has not obtained all the relief that he sought, and his right to pursue the appeal may be justified on this basis, as the Court apparently assumed in *McDonald*.[28]

3. *The public's interest in the resolution of a legal dispute does not supply the requisite case or controversy*

The court of appeals erred in suggesting (Pet. App. 26a-27a) that several "discretionary elements" could support an exercise of jurisdiction in this case. As the Court stated in *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974), "purely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court." For example, although a state court is not subject to Article III and may choose to adjudicate a moot controversy "because of its public importance," the federal courts are "limited by the case-or-controversy

[28] In *Share* v. *Air Properties G. Inc.*, 528 F.2d 279, 283 (9th Cir. 1976), cited by the Court in *McDonald* (432 U.S. at 393 n.14) for the proposition that a prevailing plaintiff may appeal the denial of class action certification, the court of appeals explained the appellants' personal stake in the controversy as follows:

> It is simply not true * * * that the successful plaintiff in an individual [damages] action would have no incentive to challenge a denial of class status. Presumably, a reversal of the denial would lead to a greater recovery and hence lower the proportion of plaintiff's individual recovery going to his attorney.

See also *Galvan* v. *Levine*, 490 F.2d 1255 (2d Cir. 1973).

requirement of Art. III to adjudication of actual disputes between adverse parties." *Ibid.* The court of appeals' reference to the fact that "numerous federal prisoners" are concerned with the resolution of the legal issues presented in this litigation (Pet. App. 26a) is thus not relevant to the question of justiciability in this case.[29] If the importance of a question were enough to call for its prompt resolution, there would be no bar to the issuance of purely advisory opinions.

The fact that respondent, or at least respondent's attorneys, have indicated no "diminution of vigor in their efforts" (Pet. App. 27a) is similarly irrelevant. See *Richardson* v. *Ramirez*, *supra*, 418 U.S. at 36; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). The vigor of the attorneys' representation "cannot alter the fact" that respondent's case is moot. *Ibid.* Indeed, if an attorney's vigor sufficed to create a case or controversy, there would be no need for plaintiffs, and the Article III bar on the resolution of "hypothetical or abstract" controversies would be meaning-

[29] The court of appeals' suggestion (Pet. App. 27a) that the restrictions on interlocutory appeals from class certification denials (see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)) support a finding of jurisdiction in this case is insubstantial. The rules of appellate jurisdiction cannot expand the scope of Article III cases or controversies. At all events, Congress has ample power (if it thinks that the unavailability of interlocutory appeals is detrimental to plaintiffs) to amend 28 U.S.C. 1292 to provide jurisdiction in the courts of appeals for the review of class action determinations.

less. See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937).

C. The Proposed Intervention Of Additional Parties In This Court Cannot Create Jurisdiction In This Case

Respondent's counsel has filed a motion for five persons to intervene in this Court. If this case were not already moot, we would not oppose the substitution or intervention of any of the proposed intervenors who otherwise would be proper parties.[30] Because the case is moot, however, this Court has no power to grant the motion to intervene. In the absence of a pending case or controversy, there is nothing into

[30] Only James Taylor appears to possess claims of the type initially presented by respondent. Harry Cardillo is scheduled for mandatory release on July 2, 1979, and thus his claims will become moot before this Court rules on the intervention motion. James Rust was released from prison on April 23, 1979; his claims, like those of respondent, are therefore moot. For different reasons, Millard V. Hubbard and David Gillis are also not proper parties to this suit.

According to information contained in respondent's motion in the district court (see note 10, *supra*), Hubbard was sentenced by a federal district judge in the Northern District of Illinois in September 1972 to 10 years' imprisonment. But Hubbard is not yet serving his federal sentence. Instead, he is serving a state sentence previously imposed by an Illinois court. He is thus not currently subject to the federal parole authority, and it does not appear that he soon will be. His challenge to the operation of the federal parole system therefore lacks ripeness.

Gillis is incarcerated at a federal correctional institution in North Carolina. Since this case has never been certified as a nationwide class action (or even as a local class action), the addition of Gillis to this action would create unnecessary practical problems. See *Starnes* v. *McGuire*, 512 F.2d 918, 929-931 (D.C. Cir. 1974) (en banc).

which new parties can enter. Persons with live claims must file their own actions.[31]

A motion to intervene is ancillary to the principal case. A court has authority under Fed. R. Civ. P. 24 to grant a motion to intervene "in an action" only when it has jurisdiction over the "action" itself. *Hofheimer* v. *McIntee*, 179 F.2d 789, 792 (7th Cir.), cert. denied, 340 U.S. 817 (1950):

> An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit. * * * [If the main action has] been rightfully necessarily dismissed, * * * there [is] nothing left in which the movant could intervene.

See also *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974); *Glover* v. *Coffing*, 177 F.2d 234 (7th Cir. 1949), cert. denied, 339 U.S. 904 (1950). It has thus consistently been held that, if the "action" has become moot before the motion to intervene is acted upon, the court had no jurisdiction to grant the motion. "[I]ntervention may not be allowed to give life to a law suit which does not actually exist * * * [or] breathe new life into an action which [is] no longer justiciable * * *."[32] *Becton* v. *Greene County Board of Education*, 32 F.R.D. 220, 223 (E.D. N.C. 1963). See also *Schmoll Fils, Inc.* v. *The Fernglen*, 85 F. Supp. 578 (S.D. N.Y. 1949); *Levenson* v. *Little*, 75 F. Supp. 575 (S.D. N.Y. 1948). Because this case became moot while it was pending in the court of appeals, the motion to intervene should be denied. The case should be dismissed outright. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

[31] The fact that intervention was sought by another prisoner before respondent's claim became moot does not affect this analysis (see notes 6, 13, *supra*). That application for intervention was denied by the district court; it became moot prior to the decision of the court of appeals.

[32] *Rogers* v. *Paul*, 382 U.S. 198 (1965), is consistent with these decisions. The Court allowed intervention in *Rogers* of new parties where the motion was filed before the claims of the original plaintiffs became moot. The motion may not have been granted until after the original plaintiffs' claims became moot, but jurisdiction nonetheless continued in the case because it had been previously certified as a class action. *Id.* at 199. See *Franks* v. *Bowman Transportation Co., supra*. By contrast, the motions to intervene in this Court were filed more than 16 months after respondent's claim became moot, and the case has not been certified as a class action.

II

THE DISTRICT COURT DID NOT ERR IN NOT CONSTRUCTING AND CERTIFYING SUBCLASSES THAT RESPONDENT NEVER SUGGESTED

The court of appeals' conclusion that this case is not moot rests on its conclusion that a class action was "certifiable." We have argued above that the "certifiability" of a class is irrelevant if the case becomes moot before a class has been certified properly. Even if the Court disagrees with this argument, however, it does not follow that a class should be certified here in order to rescue the case from mootness. Certification is improper for two reasons. First, the class action proposed by respondent was

not "certifiable." Second, even if the construction of subclasses sometimes is a way to create a "certifiable" class, a district court has no obligation to construct and certify subclasses *sua sponte*. Consequently, the district court properly denied class certification in this case. Because the denial of certification was proper, there is no support for the court of appeals' remand for further proceedings.

Respondent sought the certification of a class of all persons now or in the future eligible for parole. As the court of appeals concluded (Pet. App. 29a), certification of such a class would have been improper. The class would have contained persons with antagonistic interests. Some prisoners may be aggrieved by the guidelines, but other prisoners may find that the guidelines reduce the length of time they may be expected to serve. And respondent, who was sentenced after the promulgation of the guidelines and resentenced specifically to take the guidelines into account, could not represent persons sentenced before (or in ignorance of) the promulgation of the guidelines. A class cannot be certified when the interests are antagonistic, or when some portions of the class have interests not adequately represented by the named plaintiff. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Kremens* v. *Bartley, supra*. These principles are undisputed by respondent. It must follow that there was no "certifiable" class in the case, or at least none proposed by respondent. Under the court of appeals'

approach to jurisdiction, then, the case would be moot unless the district court had an obligation to identify some certifiable subclass.

A district court has authority under Fed. R. Civ. P. 23(c)(4) to alleviate difficulties encountered or anticipated in the management of a class action by dividing the class into appropriate subclasses. The creation of such subclasses, as well as the determination whether any class should be certified, rests in the discretion of the trial court. *Rex* v. *Owens*, 585 F.2d 432, 436 (10th Cir. 1978); *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975). No court had held, prior to the decision of the court of appeals in this case, that the district court must identify and construct subclasses even though the plaintiff has not requested it to do so.[33]

As a general principle, it is the plaintiff's burden to establish the propriety of certifying the class he

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[33] The court of appeals' reliance (Pet. App. 30a-31a) on *Samuel* v. *University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976), is unwarranted. *Samuel* held that the district Court erred in concluding that a class action was unmanageable and that the district court's decertification of the class was therefore improper. The court added, in dicta, that even if the class action were unmanageable the court should have considered "the possible usefulness of subclasses" to avoid management problems. 538 F.2d at 996. The decision does little more than point out the potential benefits of using subclasses to alleviate management difficulties; it did not place on the district court an obligation to create subclasses for the benefit of plaintiffs who have not sought subclass certification.

has identified in his request for class action certification.[34] If the proposed class is overbroad or otherwise inappropriate, the plaintiff must retain the responsibility of demonstrating the suitability of proceeding with subclasses. "Counsel for class have primary responsibility for pressing [a] class action claim, and they do not satisfy their responsibilities by simply affixing [the] class action label to [a] suit and depositing it with [the] clerk." *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 999 (5th Cir. 1978) (en banc).[35]

But respondent essentially did no more in this case. Respondent never suggested to the district court that it consider the possibility of subclass certification, even after petitioners, in opposing the motion to certify, contended that the proposed class was overly broad (Br. in Opp. to Pet. for Habeas Corpus (filed Dec. 13, 1976) at 5-6). After the district court denied certification, respondent did not move for re-

[34] See, *e.g.*, *Rex* v. *Owens, supra*, 585 F.2d at 435; *Smith* v. *Merchants & Farmers Bank of West Helena*, 574 F.2d 982, 983 (8th Cir. 1978); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968 (1978); *Doctor* v. *Seaboard Coast Line R.R.*, 540 F.2d 699, 706 (4th Cir. 1976); *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974). See also 3B *Moore's Federal Practice*, ¶ 23.02-2, at 23-96 (2d ed. 1977); 7A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1798, at 244-245 (1972).

[35] See also *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 354-359 (1978), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) which establish that the plaintiffs (not the defendants or the court) have the principal responsibility for proposing, managing and bearing the costs of class litigation.

consideration or propose that subclasses be created. Indeed, even in his brief in the court of appeals respondent did not argue that subclass certification should have been considered. He argued instead that the proposed class was not overbroad (Appellant's Brief at 23-25), a contention that the court of appeals correctly rejected (Pet. App. 29a). In this situation, there is no basis to excuse respondent's failure to propose subclass certification and to impose that duty on the district court instead.

Rule 23(c)(4) does not direct the district court to act on its own initiative to construct subclasses when the proposed class is overbroad.[36] It is inconsistent with basic principles of adversary litigation to construe the Rule to impose such an obligation on the trial court when the plaintiff has failed to suggest such an alternative.[37] Placing the burden on the court rather than on counsel to propose subclass certification also is contrary to the accepted principle that grounds for reversal may not ordinarily be urged on appeal that were available, but not raised, in the district court. See, *e.g.*, *Dothard* v. *Rawlinson*,

[36] Rule 23 differs in this regard from Rule 21, which provides that the court may add or drop parties "of its own initiative at any stage of the action * * *." Although the court is thus expressly authorized to act *supra sponte* under Rule 21, major alterations in the structure of the litigation are ordinarily left for the parties to propose. See *Bass* v. *Harbor Light Marina, Inc.*, 372 F. Supp. 786, 793 (D. S.C. 1974).

[37] Cf. *Wilson* v. *Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976): "The grant, *sua sponte*, of class action relief when it is neither requested nor specified, is an obvious error."

433 U.S. 321, 323 n.1 (1977). Thus, in a similar context, the court held in *Delums* v. *Powell*, 566 F.2d 167, 190-191 (D.C. Cir. 1977), cert. denied, No. 77-955 (July 3, 1978), that a motion to decertify a class does not "put anyone on notice" that subclass certification was desired as an alternative, and that, since "no objections were raised to the absence of a subclass" at trial, the issue was not preserved for the appeal.[38]

The approach of the court of appeals here would create unmanageable difficulties for district courts. It would require trial courts to apply their limited resources in an effort to construct class certification theories that even plaintiff's counsel, possessing an adversarial interest in the litigation, has not imagined or thought worth raising. By placing this novel burden of advocacy on the district court, the decision releases counsel from their ordinary and appropriate responsibility. It exposes the court to reversal and a renewal of proceedings with regard to matters that were not contested before it and thus discourages the efficient use of judicial resources by class action litigants.

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[38] Nothing suggests that an order remanding for consideration of subclass certification is necessary to correct manifest injustice, see *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941), in a case where the plaintiff did not request subclass certification in the district court or the court of appeals. If the case is dismissed by the court of appeals and other members of the proposed subclass in fact desire to litigate similar claims, they may initiate a new lawsuit in the district court.

Moreover, the court of appeals entertained the unrealistic assumption that the district courts' construction of unproposed subclasses would be beneficial to class members. "[W]hen a [challenged] action is one that may be characterized as injurious by only part of the affected group," it is frequently preferable simply to deny certification, for the named plaintiffs may not represent the entire variety of the affected interests. *Phillips* v. *Klassen*, 502 F.2d 362, 366-368 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Then plaintiffs whose claims are more typical of the alleged injuries may begin a separate action. Because every subclass must be represented by a plaintiff at the time of its certification, certification of subclasses with divergent interests often will be impossible with only the original plaintiffs before the court.[39] As was stated in *Richardson* v. *Ramirez*, *supra*, 418 U.S. at 39, a plaintiff "may not represent a class of which he is not a part." Nor may he represent a subclass of which he is not a part. *Abercrombie* v. *Lums, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972). Thus, when an action is brought by only one representative plaintiff and it is determined that the interests of the proposed class fall into opposing

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[39] The court of appeals suggested that *amici curiae* might be appointed "to represent divergent interests of subclasses" (Pet. App. 32a n.66). This may be true. But it does not explain how the district court can certify the subclass in the first place if there is no subclass representative before the court. In order to certify the subclasses under Rule 23, there must be "representative parties," and not simply *amici curiae*, to protect the interests of each subclass.

camps, an inquiry into subclass certification often would not be fruitful, even if it had been requested.

The facts of this case illustrate the complexity of the task the court of appeals has required district courts to undertake. As the court of appeals recognized (Pet. App. 30a-32a), prisoners serving either "short" or "long" sentences for the same offense may have divergent interests in challenging the guidelines. The interests of prisoners within each of these two classes may diverge again depending on the category of their various offenses.[40] Moreover, because parole decisions are made outside the guidelines in some circumstances, *e.g.*, 28 C.F.R. 2.20(c) and (d), the differing personal situations of individual prisoners may result in a further and unpredictable divergence of class alignments. There will be still further divergence depending on whether the district judge took the guidelines into account when sentencing a particular prisoner. It is all but impossible to determine whether and to what extent any individual prisoner would have fared differently if the guidelines had not been adopted (see pages 87-88 & n.77, *infra*). Accordingly, even if respondent had proposed the creation of subclasses in this case, it is by no means evident that denial of certification would have been an abuse of discretion. Indeed, because respondent could not have represented the interests of many of the possible subclasses, the district court could not have certified those subclasses at the time class cer-

[40] Respondent's complaint alleged that his offense was rated too severely under the guidelines (Pet. App. 29a).

tification was proposed. Consequently, class certification was properly denied, and the case is moot even if the court of appeals' "certifiability" theory is accepted.

III

THE PAROLE COMMISSION AND REORGANIZATION ACT DOES NOT REQUIRE THE PAROLE COMMISSION TO CONSIDER THE LENGTH OF A PRISONER'S SENTENCE IN MAKING PAROLE RELEASE DETERMINATIONS

The court of appeals ruled that the Parole Commission and Reorganization Act requires that the Commission's guidelines for the exercise of paroling discretion, and its decisions in each case, take into account the sentence imposed by the court (Pet. App. 45a). For the reasons stated above, the court of appeals lacked jurisdiction to consider the merits. But even if the court had jurisdiction, it erred in reaching this conclusion about the statute. As we show below, Congress anticipated that the Commission would continue its effort to achieve consistency and rationality in the parole process by the use of guidelines that give no weight to sentence length. Moreover, Congress intended that the weight to be assigned to any factor is to remain "solely within the province of the (Commission's) broad discretion." H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 28 (1976). The Act thus does not require the Commission to consider sentence length either in the promul-

gation of guidelines or in the exercise of its discretion in individual parole determinations.[41]

A. The Purpose Of The Parole Guidelines Is To Achieve Consistency And Rationality In The Exercise Of The Commission's Broad Discretion Over Parole Determinations

The sentence imposed defines the period during which a prisoner is eligible for parole. Although a district judge has numerous options available at sentencing,[42] the three options most commonly used are specified in 18 U.S.C. 4205(a) and (b).[43] If a

[41] The court of appeals did not squarely hold that the present parole system is invalid. Rather, it directed the district court to determine on remand whether the evidence supports the conclusion that the Commission gives no weight to sentence length in its parole determination process (Pet. App. 36a). The Commission admits, however, that no weight is given under the guidelines to the length of the judicial sentence, and it has acknowledged this in both courts below (*ibid.*). Thus, if the court of appeals had jurisdiction to issue pronouncements on the merits, its opinion effectively determines the issue of the validity of the Commission's parole procedures, and the hearing on remand would be a mere formality.

[42] A number of these options depend on the mental condition, age, or drug addiction of the convicted offender. *E.g.*, 18 U.S.C. 4205(c) (commitment for psychological study), 18 U.S.C. 4216 (offenders 22 to 25 years old at the time of conviction), 18 U.S.C. 4251-4255 (narcotic addicts), 18 U.S.C. 5005-5026 (offender less than 22 years old at the time of conviction), 18 U.S.C. 5031-5042 (juvenile delinquents).

[43] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219-231. Former Sections 4202, 4208(a)(1), and 4208

prisoner is sentenced under 18 U.S.C. 4205(a) to a term of imprisonment in excess of one year, he becomes eligible for parole after serving one-third of the maximum sentence imposed.[44] The court may sentence the offender under 18 U.S.C. 4205(b)(1) and designate a minimum term of imprisonment that establishes parole eligibility at any point between the beginning of the sentence and one-third of the maximum. Or the court may impose sentence under 18 U.S.C. 4205(b)(2), in which event the prisoner is eligible for parole "at such time as the Commission may determine." The sentence thus imposed—in conjunction with the statutory provision requiring discharge on the expiration of the term of imprisonment "less the time deducted for good conduct [under 18 U.S.C. 4161]," 18 U.S.C. 4163[45]—establishes the minimum and maximum period of confinement.

During the period between the prisoner's first eligibility for parole and his mandatory discharge, the Commission has substantial discretion in deciding

(a)(2) are recodified at 18 U.S.C. 4205(a), 4205(b)(1) and 4205(b)(2). The Act also renamed the Board of Parole as the Parole Commission.

[44] If the sentence is for more than 30 years, the prisoner becomes eligible for parole under 18 U.S.C. 4205(a) after serving 10 years.

[45] "Good time" credits can accumulate to as much as one-third of the sentence, but more commonly they amount to approximately one-quarter of the sentence. Prisoners discharged on the basis of good time credits under 18 U.S.C. 4163 are released "as if on parole" and come under the supervision of the Commission until the sentence expires. 18 U.S.C. 4164.

whether to grant parole.[46] Under 18 U.S.C. (1970 ed.) 4203(a), which was in effect when respondent was sentenced, the Commission was entitled to consider the risk of recidivism and any other aspect of the public welfare in making its decision.[47] Under the present statute, enacted in 1976, the Commission must consider whether, in view "of the nature and circumstances of the offense and the history and characteristics of the prisoner, * * * release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law." 18 U.S.C. 4206(a)(1).

[46] Since 1976 this discretion has been slightly altered in one regard. Under 18 U.S.C. 4206(d), a prisoner sentenced to a term of five years or longer is presumptively entitled to release on parole after he has served two-thirds of his sentence (or 30 years of any sentence in excess of 45 years). Parole may be withheld thereafter only on a finding by the Commission that the prisoner has "seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime." *Ibid.*

This provision has no direct relevance to the Commission's practice under the guidelines because, to the extent it applies, it simply displaces the guidelines. 28 C.F.R. 2.53. The provision has some relevance, however, in understanding Congress's intent in enacting the other provisions of the Parole Commission and Reorganization Act. See pages 63-64 & note 58, *infra*.

[47] 18 U.S.C. (1970 ed.) 4203 provided:

> If it appears to the Board of Parole * * * that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

See also note 46, *supra*. These standards give the Commission ample if not unlimited discretion; courts have recognized that under both the new and the old statute the Commission's paroling discretion is essentially absolute. *E.g., Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Brest* v. *Ciccone*, 371 F.2d 981 (8th Cir. 1967).

Until 1970 the Commission exercised its discretion case by case, using few published criteria. In response to widespread criticism that this led to arbitrary and erratic decisions,[48] the Commission, in cooperation

[48] Both the federal and state parole boards had been criticized severely for the failure to adopt formal standards for parole decision making. A report of the National Advisory Commission on Criminal Justice Standards and Goals summarized this shortcoming as follows:

> The absence of written criteria by which decisions are made constitutes a major failing in virtually every parole jurisdiction. Some agencies issue statements purporting to be criteria, but they usually are so general as to be meaningless. The sound use of discretion and ultimate accountability rest largely in making visible the criteria used in forming judgments. Parole Boards must free themselves from total concern with case-by-case decision making and attend to articulation of the actual policies that govern the decision making process.

National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973). See also N. Morris, *The Future of Imprisonment* 24-43 (1974); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); A. von Hirsch & K. Hanrahan, *Abolish Parole?* 7-14 (1978).

The federal Parole Board in particular was sharply criticized for its failure to articulate an explicit paroling policy:

> An outstanding example of completely unstructured discretionary power that can and should be at least par-

with the Research Centers of the National Council on Crime and Delinquency, undertook an analysis of its previous decisions in order to identify the policies and release criteria implicit in those decisions. These studies showed that in making parole decisions the primary concerns were severity of offense, parole prognosis, and institutional behavior, and that a fairly accurate prediction of the Commission's parole release decisions could be made by knowledge of the Commission's evaluations of these three factors.[49]

As a result of these studies, the Commission began to experiment with structured release criteria that took into account the factors that figured most prominently in the Commission's past decisions—the nature of the offense and the offender's personal character-

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tially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents * * *.

K.C. Davis, *Discretionary Justice* 126 (1969). A similar suggestion for the adoption of paroling guidelines was made by the Administrative Conference of the United States. See *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole (adopted June 9, 1972)*, 2 *Recommendations and Reports of the Administrative Conference of the United States* 58-62 (1973).

[49] See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime and Delinquency 34, 37 (1975). See also the data discussed in Morris, *supra*, and Stanley, *supra*.

istics.[50] It ranked offenses by severity and assigned weights to offender characteristics according to their statistical value as predictors of recidivism. For each combination of offense severity and risk of recidivism, the prisoner and the Parole Commission could find in a table a range (*e.g.*, 36 to 45 months) that approximately 80% to 85% of the persons with similar char-

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[50] Respondent contends (Br. in Opp. at 14-15) that these studies did not give any role to the length of sentence imposed by the court because the studies were based on observations of the Commission's release decisions in cases involving persons sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010.

The studies focused on Federal Youth Corrections Act sentences because that statute left the Commission almost entirely free to make decisions, unfettered by minimum sentences or varying mandatory release dates. See Hoffman, *Paroling Policy Feedback* 10 (NCCD Supp. Rep. No. 8, 1973). Youth cases therefore were ideal for research to determine what factors the Commission was taking into account. Regular adult cases might mask the factors: if there was a minimum time of service before parole eligibility, the Commission would be forbidden to release a prisoner who might be released under the Commission's independent analysis. Similarly, a disparity in maximum terms might have required the Commission to release a prisoner on good time credits under 18 U.S.C. 4163 who would be retained in prison if the Commission's weighing of factors prevailed. The indeterminate nature and uniform length of the Federal Youth Corrections Act sentences made it possible to isolate the criteria the Commission in fact employed in its parole decisions.

In any event, the question at issue here does not turn on the origins of the guidelines, but on whether their failure to consider sentence length contravenes the intent of Congress in enacting the Parole Commission and Reorganization Act.

acteristics could expect to serve, with good institutional behavior, before release.[51]

The research was commenced in 1970, before respondent was sentenced. The use of guidelines based on the study results was initiated on a trial basis in one region in 1972 and was significantly revised and extended throughout the nation in November 1973 (38 Fed. Reg. 31942).[52] The present guidelines are codified at 28 C.F.R. 2.20. The objective of the guidelines is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration * * *" (28 C.F.R. 2.20(a)). See also *United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976). Consistent with this objective, the guidelines are not inflexible. For each of six categories of offense severity, subdivided into four categories of offender characteristics, the guidelines indicate the broad, customary range of confinement to be served by persons with good institutional behavior.[53] 28

[51] For a history of this development and a more detailed description of the system, see Stanley, *supra*; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Federal Probation 7-15 (December 1974).

[52] The 1972 experiment in the Commission's northeast region (which includes Pennsylvania, where respondent was incarcerated) involved a table of factors for the computation of guideline release ranges similar to those in use today.

[53] See Hoffman & DeGostin, *supra*, 38 Federal Probation at 9: "By providing a specific policy range and requiring a written explanation for each decision outside this range, the guidelines endeavor to structure discretion without removing it, and thus permit more rational and consistent decisionmaking.

C.F.R. 2.20(b). The guidelines do not establish customary ranges of confinement for every conceivable offense; instead they provide several examples of offenses within each severity level. 28 C.F.R. 2.20(d). See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 106 & n.6 (7th Cir. 1977); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, *supra*, 38 Federal Probation at 9. Mitigating or aggravating circumstances relating to a particular offense, as well as institutional performance, may justify a decision outside the guidelines' ranges.[54] 28 C.F.R. 2.20(c), (d), (e). The Commission has reserved discretion to depart from the guidelines whenever it concludes that the circumstances so warrant. 28 C.F.R. 2.18, 2.20(c). Moreover, the Commission has retained authority to revise or

[54] 18 U.S.C. 4206(c) allows the Commission to grant or deny release on parole notwithstanding the guidelines if it determines there are good reasons for doing so, provided the Commission gives the prisoner written notification stating the reasons and information relied on. Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

modify the guidelines when appropriate.[55] 28 C.F.R. 2.20(g).

B. The Parole Commission and Reorganization Act Endorsed The Commission's Use Of The Parole Guidelines And Did Not Require The Commission To Consider Sentence Length In Making Discretionary Parole Decisions

In enacting the Parole Commission and Reorganization Act in 1976, Congress did not repudiate the Commission's choice to exercise its discretion pursuant to parole guidelines. To the contrary, the Act expressly directs the Commission to promulgate guidelines for the exercise of its power to grant or deny parole. 18 U.S.C. 4203(a)(1), (b). Moreover, in stating the criteria the Commission is to consider in making parole release determinations, the Act provides that such determinations are to be made "pursuant to guidelines promulgated by the Commission * * *." 18 U.S.C. 4206(a). The Act also provides that "[t]he Commission may grant or deny release on parole notwithstanding the guidelines * * * [only] if it determines there is good cause for so doing * * *." 18 U.S.C. 4206(c); see S. Conf. Rep. No. 94-648, *supra*, at 27.

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[55] See also 18 U.S.C. 4203(a)(1). The Commission has recognized that the use of guidelines might create an unnecessarily rigid system to replace the unnecessarily chaotic one that preceded it. The Commission therefore has reserved the right to depart from its guidelines in particular cases and to reexamine the guidelines periodically. See 28 C.F.R. 2.20(g); Gottfredson, Hoffman, Sigler & Wilkins, *supra*, 21 Crime and Delinquency at 41; S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

Congress thus required the Commission to employ guidelines in the exercise of its discretionary parole authority. The question in this case is not whether the adoption and use of parole guidelines is appropriate under the Act; instead it is whether, in providing for the use of such guidelines, Congress required the Commission to consider sentence length as a factor either in the establishment of the guidelines or in the application of discretion to depart from the guidelines for "good cause." As we will show, neither the language nor the history of the Act indicates that Congress intended either requirement.

1. Congress intended the Commission to reduce rather than to perpetuate the effects of sentence disparity

a. Nothing in the Act requires the Commission to consider sentence length in any way. Section 4206, which establishes the criteria to be applied by the Commission in making discretionary parole decisions, does not refer to sentence length. This Section provides, in quite general terms, that the Commission may release a prisoner who is eligible for parole if "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner * * * release would not depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare." 18 U.S.C. 4206(a).

These broad criteria form the basis of the guideline system. For example, the requirement that the "nature and circumstances of the offense" be considered in parole decisions is reflected in the guide-

lines through (1) the separate rating of offense severity for different categories of offenses and (2) the specialized rating of offense severity for individual offenses when "mitigating or aggravating circumstances" are present.[56] 28 C.F.R. 2.20(d). The requirement that the "history and characteristics of the prisoner" be considered is reflected in the guidelines by (1) the rating of prisoners into several parole prognosis categories on the basis of their personal histories and (2) the retained discretion to depart from those ratings in individual cases "where circumstances warrant." 28 C.F.R. 2.20(e). Finally, the requirement that the Commission consider whether "release would * * * depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare" is reflected in the broad ranges of customary release dates established in the guidelines for particular offense categories and the Commission's retained discretion to select an appropriate release date outside the guideline

[56] Respondent contended in the court of appeals (Pet. App. 37a) that Section 4206(a) requires the Commission to consider the "nature and circumstances of the offense and the history and characteristics of the prisoner" on an "individualized" basis. This argument is inconsistent with the requirement of the statute that parole determinations be made "pursuant to guidelines" unless there is "good cause" for departing from the guidelines. 18 U.S.C. 4206(a), (c). In any event, the guidelines do permit "individualized" consideration of these factors in all cases where the circumstances warrant. See 28 C.F.R. 2.20(d), (e). The record reflects that such an individualized determination was made in this case (A. 6; Pet. App. 5a).

ranges for "good cause." 28 C.F.R. 2.20(c). Since the guidelines properly reflect the parole criteria established in Section 4206, there is no basis for concluding that they are invalid because they do not also provide for consideration of sentence length in parole decisionmaking.

b. The legislative history of the Act indicates that Congress was aware of the Commission's use of parole guidelines based on offense severity and offender characteristics [57] and that Congress endorsed the Commission's use of its guidelines to reduce the effects of sentencing disparity and to achieve a fair and consistent application of its parole authority.

The original version of the Act adopted in the House of Representatives (H.R. 5727, 94th Cong., 1st Sess. (1975)) provided that a prisoner must be released after serving one-third of his sentence unless the Commission determines that the prisoner should not be released because of the prisoner's recividistic tendencies, because release would depreciate the seriousness of the crime, or because release would be "incompatible with the welfare of society." H.R. Rep. No. 91-184, 94th Cong., 1st Sess. 4-5 (1975). This presumptive release provision was removed from the

[57] In hearings before the appropriate subcommittees of the House and Senate Judiciary Committees, Maurice H. Sigler, Chairman of the Parole Board, explained the operation of the guideline system. See *Hearings on Parole Legislation Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 13-16, 30 (1973); *Hearings on H.R. 1598 and identical bills Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 127-128 (1973).

Senate version of the bill.[58] The Senate amendment to the House bill, which was adopted in Conference, provided that a prisoner was to be *eligible* for release on parole after one-third of his sentence had been served but that, before granting parole, the Commission must determine that the prisoner was a proper candidate for release under the criteria set forth in Section 4206. S. Rep. No. 94-369, 94th Cong., 1st Sess. 22, 23 (1975).

As a result of this difference in approach, the House and Senate versions of this legislation viewed the role of the guidelines somewhat differently. Under the House bill, the Commission was empowered to "establish general policies, guidelines, rules, and regulations * * *, including rules with respect to the factors to be taken into account in determining whether or not a prisoner should be released on parole." On the other hand, the Senate amendment to the House bill authorized the Commission to "promulgate rules and regulations establishing guidelines" for the power, *inter alia*, of "granting or denying parole," and "such other rules and regulation as are necessary to carry out a national parole policy * * *." S. Rep. No. 94-369, *supra*, at 2, 3. It was the Senate version of the guideline provision that was adopted in Conference.

[58] The presumptive entitlement to release that the House proposed at the completion of one-third of the sentence ultimately was provided, under somewhat altered criteria, at the two-thirds point. 18 U.S.C. 4206(d) (limited to prisoners serving a sentence of five years or more). See note 46, *supra*.

Senator Burdick, a major proponent of the Senate version of the Act, explained on the Senate floor that the "rules and regulations" authorized by the legislation "include a set of guidelines adopted by the Parole Board." 121 Cong. Rec. 28833 (1975). He explained the reason why these guidelines should be incorporated into the statutory scheme (*ibid.*):

> These guidelines are based on the seriousness of each criminal offense, and upon those elements of the offender's background that are the best predictors as to whether or not the person is likely to commit another crime * * *.
>
> The guidelines serve two important purposes: They carefully structure the vast discretion presently entrusted to the Federal Parole Authority and decrease uncertainty as to how much time the inmate must serve. This structuring of discretion prevents arbitrary and ill-considered decisionmaking and injects a sense of fair play in every aspect of the parole process.
>
> Because most release criteria are based upon data available at the time of conviction, an inmate can calculate with great accuracy the time he is likely to serve.

See also S. Rep. No. 94-369, *supra*, at 18, 20, 25.

The Conference Committee also expressly approved the continued use of the guidelines the Commission had adopted prior to enactment of the new legislation.

> [T]he promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt

> as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

S. Conf. Rep. No. 94-648, *supra*, at 20; H.R. Conf. Rep. No. 94-838, *supra*, at 20.[59] The Conference Reports emphasized that "parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system," *id.* at 19,[59a] and that it "is important for the parole process to achieve an aura of fairness by basing determinations of just punishment on comparable periods of incarceration for similar offenses committed under similar circumstances." [60] *Id.* at 26. See also

[59] The court of appeals simply ignored this portion of the Conference Committee Reports in stating that "the conference bill did not contain explicit endorsement of the guidelines as they were currently promulgated" (Pet. App. 43a).

[59a] The reports continued (S. Conf. Rep. No. 94-648, *supra*, at 20; H.R. Conf. Rep. No. 94-838, *supra*, at 20):

> In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold the offender accountable for his own acts. * * * The use of guidelines * * * will sharpen this process and improve the likelihood of good decisions.

[60] The disparity in criminal sentences has been strongly criticized. See, *e.g.*, M. Frankel, *Criminal Sentences: Law Without Order* (1973). Moreover, attempts by district courts to reduce sentencing disparity through consultation, sentencing councils and other devices have not been notably successful. See, *e.g.*, Diamond & Ziesel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975). Cf. Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. Research J. 881. The need of the parole system to offset these disparate sentencing policies to achieve a consistent parole policy was a significant factor in the adoption of the guidelines method by Congress. See *Banks* v. *United States*, 553 F.2d 37, 40 (8th Cir. 1977).

S. Rep. No. 94-369, *supra*, at 18. The Conferees emphasized that decisions under the guidelines would "achieve both equity between individual cases and a uniform measure of justice," goals that cannot be achieved unless the Commission applies a uniform standard of offense seriousness that is independent of the views of individual sentencing judges. H.R. Conf. Rep. No. 94-838, *supra*, at 26.

The Conferees also stated that, in making parole release decisions, the Commission should first reach a judgment on the prospective parolee's institutional behavior and then review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. S. Conf. Rep. No. 94-648, *supra*, at 25; H.R. Conf. Rep. No. 94-838, *supra*, at 25. These are the very factors that the Commission had employed since 1973 in making parole decisions under the guidelines. Congress anticipated that the vast majority of parole release decisions would be based on guidelines incorporating these factors, and that deviations from the guidelines would be warranted only on a determination of good cause. 18 U.S.C. 4206(c); see 122 Cong. Rec. 4861 (1976) (remarks of Sen. Burdick); S. Conf. Rep. No. 94-648, *supra*, at 23, 27; H.R. Conf. Rep. No.

94-838, *supra*, at 23, 27.[61] Nothing in the legislative history suggests that a judge's view of the seriousness of an offense always is "good cause" for deviation from the guidelines. To the contrary, Congress recognized that "[d]eterminations of just punishment are part of the parole process" and thus approved a guideline system that gives substantial weight to the *Commission's* view of "just punishment." S. Conf. Rep. No. 94-648, *supra*, at 26; H.R. Conf. Rep. No. 94-838, *supra*, at 26.

The legislative history thus demonstrates that Congress intended the Commission, operating within the guideline system, to reduce the disparity that is associated with sentencing by individual judges, who may give dramatically different sentences to similarly situated offenders. Congress, by approving the use of guidelines, provided for a fair and more uni-

[61] The conferees noted that under the Act, the Commission's guidelines "shall provide a fundamental gauge by which parole determinations are made" and that "[i]f decisions to go above or below parole guidelines are frequent, the Commission should reevaluate its guidelines." S. Conf. Rep. No. 94-648, *supra*, at 26, 27; H.R. Conf. Rep. No. 94-838, *supra*, at 26, 27.

As Representative Kastenmeier explained, in describing the differences between the House and Senate versions and the compromises reached by the Conference Committee (122 Cong. Rec. 5163 (1976):

> The primary disagreement between the House and Senate was the question of how much discretion should be retained by the Commission in making release determinations once a prisoner is in fact eligible for parole. This was resolved by increasing the role of the parole determination guidelines and by granting the Commission the option of acting outside the guidelines in extraordinary cases.

form application of the Commission's paroling discretion. See *Banks* v. *United States*, 553 F.2d 37, 40 (8th Cir. 1977). The history of the Act demonstrates that Congress was aware of how the guidelines operated and intended the Commission to continue to exercise its broad discretion under the guidelines. See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 107 (7th Cir. 1977); *Banks* v. *United States*, *supra*, 553 F.2d at 40. Congress not only approved the guidelines but also provided that the Commission's exercise of discretion in individual cases was to be immune from judicial review. 18 U.S.C. 4218(d). The Conference Committee repeatedly emphasized that the weighing of factors was absolutely committed to the Commission's discretion.[62] This fully establishes that the Commission, rather than the courts, is to decide how much (if any) weight to give to the sentence actually imposed in a given case. In the view of Congress and the Commission, it is the

[62] "[I]t is the intent of the Conferees that the Parole Commission make certain judgments pursuant to [Section 4206], and that the substance of these judgments is committed to the discretion of the Commission." S. Conf. Rep. No. 94-648, *supra*, at 25; H.R. Conf. Rep. No. 94-838, *supra*, at 25.

"The Conferees are in complete agreement with the Fifth Circuit holding in *Scarpa* v. *U.S. Board of Parole*, 477 F.2d 281 (1973), vacated as moot, 414 U.S. 809, that the weight assigned to individual factors (in parole decision making) is solely within the province of the (commission's) broad discretion." *Id.* at 28.

"It is the intent of the Conferees that Commission decisions involving the grant, denial, modification or revocation of parole shall be considered actions committed to agency discretion * * *." *Id.* at 36.

nature of the offense itself, and not a particular district judge's evaluation of that offense, that should be given dominant weight.

2. *18 U.S.C. 4207 does not require the Commission to give weight to sentence length*

Respondent argued in the court of appeals (Pet. App. 38a) that 18 U.S.C. 4207 requires the Commission to consider sentence length in individual parole determinations. This provision directs the Commission to consider the following specific information "if available and relevant:" (1) reports and recommendations by the prison staff; (2) the prisoner's prior criminal record; (3) presentence investigation reports; (4) the sentencing judge's "recommendations regarding the prisoner's parole" made at the time of sentencing,[63] and (5) reports of physical, mental or psychiatric examinations of the prisoner. 18 U.S.C. 4207(1)-(5). Obviously, none of these specific provisions requires the Commission to give weight to sentence length.

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[63] The Conference Reports note that "if a judge has not commented on the sentence or parole of the offender, the Commission is under no duty to solicit such commentary." S. Conf. Rep. No. 94-648, *supra* at 28; H.R. Conf. Rep. No. 94-838, *supra*, at 28. It follows that the actual sentence imposed by the district court is not, by itself, a "recommendation" regarding parole within the meaning of this provision. If, at the time of sentencing, the court explains its reasons for giving a particularly harsh or particularly lenient sentence, that information will be considered by the Commission under 18 U.S.C. 4207(4).

Respondent apparently maintains (Pet. App. 38a), however, that the Commission must give substantial weight to sentence length in making parole decisions because Section 4207 also requires the Commission to consider such "additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available." It seems unreasonable to assume that, in directing the Commission to consider "additional relevant information," Congress imposed a requirement that sentence length be given weight in every case. It would have been simple enough for Congress to have specified such a requirement had that been what Congress intended. But, in any event, the legislative history makes clear that Congress did not seek to impose such a requirement. The Conference Reports state (S. Conf. Rep. No. 94-648, *supra*, at 28; H.R. Conf. Rep. No. 94-838, *supra*, at 28):

> The relevance of material before the Commission is a determination committed to the agency's discretion. Moreover, this provision [section 4207] should not be construed as setting out priorities or assigning weights to the information before the Commission in the parole release process. The Conferees are in complete agreement with the Fifth Circuit holding in *Scarpa* v. *U.S. Board of Parole*, 477 F.2d 281 (1973), vacated as moot, 414 U.S. 809, that the weight assigned to individual factors (in parole decision making) is solely within the province of the (commission's) broad discretion.

Because the Commission, in the exercise of discretion that Congress has provided, has determined that the length of the judicial sentence is not relevant either in establishing guidelines or in discretionary parole determinations, there is no basis for interpreting Section 4207 to require the Commission to consider sentence length as "additional relevant information."

3. *The Constitution does not require the Commission to give weight to sentence length in discretionary parole determinations*

The court of appeals stated that it had "constitutional doubts" about the validity of the Act if it does not require the Commission to "take account of the sentence imposed by the court" (Pet. App. 46a) in its discretionary parole determinations. The court thought that the Commission's disregard of sentence length would erode judicial power, "nullify the discretion which the trial judges are required to exercise" (*id.* at 48a-49a), undermine "the constitutional protections provided by an independent judiciary" (*id.* at 50a), and amount to a delegation to the Commission of Congress' power to "redraft[] the penalty provisions of the United States criminal code" (*id.* at 52a; footnote omitted).

These dire charges are quite unsupported. Nothing that the Commission does changes the sentence selected by the court or the range of sentences established by statute. Congress, courts and the Commission play independent and distinct roles in the proc-

ess of determining how long a prisoner spends in jail. Congress defines the offenses and sets limits on sentences that may be imposed by courts. The sentencing court is empowered to select, within these statutory limits, a maximum and minimum term of imprisonment. The Commission is free, within these judicially-set limits, to select the date of release.

Congress has established important restrictions on the power of courts to prescribe the actual amount of time any prisoner serves. See pages 52-53, *supra*. A court cannot set a parole eligibility date that is more than one-third of the maximum term it imposes. 18 U.S.C. 4205(b)(1). It may not "split" a sentence between imprisonment and probation unless the imprisonment to be served is no more than six months. 18 U.S.C. 3651. The court may modify its sentence during the first 120 days after it becomes final, but that time cannot be extended. Fed. R. Crim. P. 35, 45(b).[64]

The authority to grant parole is vested in the Parole Commission exclusively. 18 U.S.C. 4203(a)(1). See *United States* v. *Grayson*, 438 U.S. 41, 47 (1978). The Commission exercises this authority within the period between the earliest eligibility for release and the date of mandatory release established by good time credits. Since parole is not simply a

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[64] This Court has before it the question whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing judge's expectations." *United States* v. *Addonizio*, No. 78-156, argued March 27, 1979.

way of enforcing the court's sentence, but instead "originated as a form of clemency," S. Conf. Rep. No. 94-648, *supra*, at 19, there is no reason why Congress *must* direct the Parole Commission to "take account" (Pet. App. 46a) of the sentencing decision made by the Court. A decision to afford relief from a lawfully-imposed sentence thus need not, as a constitutional necessity, give consideration to the initial assessment of just punishment made by the sentencing court.[65]

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[65] The court of appeals also appears to have concluded that Congress could not delegate to the Commission the power to determine appropriate terms of incarceration for classes of violators because that would amount to "redrafting the penalty provisions of the United States criminal code" (Pet. App. 52a). The court's analysis is based on hyperbole. The Commission's actions cannot alter the terms of any judicially-imposed sentence or the penalty provisions of the criminal laws on which such sentences are based. The guidelines cannot be applied to detain a prisoner beyond his maximum release date or to release him before he first becomes eligible for parole. It is only when the Commission has discretion to consider parole that its guidelines become applicable.

There is no basis for doubting that Congress may act to provide for a consistent and fair parole policy to guide the exercise of the Commission's discretion. Certainly such congressional action is in furtherance of rational purposes. Congress could even provide that all sentences must be indeterminate, placing the full power to grant release in the hands of parole authorities or a form of sentencing commission. (See the Federal Youth Corrections Act, 18 U.S.C. 5005-5026, which establishes an indeterminate sentence procedure.) If indeterminate sentences, which bar courts from *any* role in selecting a release date, are not unconstitutional, then the application of the Commission's guidelines within judicially-selected ranges cannot be unconstitutional.

IV

APPLICATION OF THE PAROLE RELEASE GUIDELINES TO PRISONERS WHO WERE SENTENCED PRIOR TO THE EFFECTIVE DATE OF THE GUIDELINES DOES NOT VIOLATE THE EX POST FACTO CLAUSE

The court of appeals stated that the guidelines restrict the broad discretion that the Commission previously had exercised in its parole decisions and that, by unduly structuring the parole process, the guidelines deprive prisoners "of the possibility of a substantially more lenient punishment" (Pet. App. 58a). The court reasoned that "the possibility of a substantially more lenient punishment" was a part of each prisoner's sentence prior to promulgation of the guidelines, and that depriving prisoners of this "possibility" would constitute increased punishment in violation of the Ex Post Facto Clause (*id.* at 58a-65a). Although it appeared to the court that the guidelines act as an "unyielding conduit" to impose substantial limitations on the Commission's discretion to grant parole, and that application of the guidelines to previously sentenced prisoners therefore violates the Ex Post Facto Clause, the court directed the district court to hold a factual hearing on the issue on remand.[66]

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[66] The court suggested that the guidelines might be constitutional "if in practice the parole authorities found good cause to deviate from the guidelines in 60% of the cases * * *" (*id.* at 64a). The court noted that the Parole Commission admitted that parole was granted prior to the customary release date under the guidelines in only 8.7% of the cases (*ibid.*).

The court of appeals erred in considering any Ex Post Facto Clause question. Even if this case is not moot, and even if the district court had some responsibility to construct subclasses, no certifiable subclass could be constructed that presents any question about the ex post facto application of the guidelines. Respondent was sentenced on January 25, 1974, two months after the guidelines were promulgated. Respondent's sentence was reduced in October 1975 for the sole purpose of taking the effect of the guidelines into account (see pages 7-8, *supra*). Application of the guidelines to respondent's sentence was fully anticipated by the sentencing judge. Consequently, respondent could not represent any subclass of prisoners who were sentenced before the adoption of the guidelines, or any subclass of prisoners for whom the guidelines produced an unexpected effect. See *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra; Kremens* v. *Bartley, supra; O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

If the Court disagrees with this submission, however, then it must evaluate the court of appeals' analysis of the ex post facto arguments. That analysis is flawed in two major respects. First, application of the parole guidelines to previously sentenced prisoners does not deprive them of any preexisting right or impose any additional punishment. Both before and after adoption of the guidelines, prisoners had no right to release on parole at any particular point; instead, prisoners simply become "eligible" for parole at the Commission's discretion. The guidelines do not affect the date of parole eligibility. They are an exercise, rather than a reduction, of the Commission's discretion. They thus do not constitute an ex post facto law under this Court's decisions. Second, the guidelines do not remove the possibility that a substantially more lenient punishment may result for individual prisoners. By providing broad ranges of customary release dates for various categories of offenders and offenses, the guidelines do not remove the possibility that a parole decision will be made for an earlier (or later) release date whenever the circumstances warrant. 28 C.F.R. 2.20(b), (c), (d), (e), (g).[67]

A. The Parole Guidelines Are Not A Change Of Law That Deprives Prisoners Of A Preexisting Right Or Imposes A Greater Punishment

The Constitution forbids both Congress and the States from enacting an "ex post facto Law." Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.[68] This Clause prohibits enactment of any statute

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[67] Courts other than the Third Circuit have sustained the Commission's practices against challenges based on the Ex Post Facto Clause. See *Zeidman* v. *United States Parole Commission*, No. 78-1590 (7th Cir. Mar. 20, 1979); *Rifai* v. *United States Parole Commission, supra; Shepard* v. *Taylor*, 556 F.2d 648, 654 (2d Cir. 1977); *Ruip* v. *United States*, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). But cf. *Rodriguez* v. *United States Parole Commission*, No. 78-2051 (7th Cir. Mar. 20, 1979), discussed at note 74, *infra*.

[68] Although the Clause applies only to legislative enactments, its terms, enforced through the Due Process Clause, apply to the actions of the Judicial and Executive Branches and require fair warning of proscribed conduct and the penalties attached thereto. *Marks* v. *United States*, 430 U.S. 188, 191 (1977). See *Rodriguez* v. *United States Parole Commission, supra*, slip op. 7. We thus concede that ex post facto principles apply to the Commission's actions.

> which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

Dobbert v. *Florida*, 432 U.S. 282, 292 (1977), quoting *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925). See *Calder v. Bull*, 3 U.S. (3 Dal.) 386, 390 (1798). The Clause does not, however, prohibit every change of law that "may work to the disadvantage of a defendant * * *." *Dobbert* v. *Florida*, *supra*, 432 U.S. at 293. It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Ibid.*, quoting *Beazell* v. *Ohio*, *supra*, 269 U.S. at 171.

The parole guidelines do not constitute an ex post facto law under these decisions because they neither deprive prisoners of any preexisting right nor enhance the punishment imposed. The guidelines do not, of course, affect the maximum term of imprisonment that a prisoner may be required to serve. The statutory range of punishments does that. The guidelines do not set the sentence in any case, either. The judicially-selected term, in combination with "good time" credits, determines that. 18 U.S.C. 4163. The guidelines do not affect the minimum term of imprisonment that the prisoner *must* serve; that is determined by the court's choice among sentencing options. See 18 U.S.C. 4205(a), (b). The time at

which a prisoner first becomes "eligible" for parole is thus determined by the sentencing court and the sentencing statutes and is not affected by the guidelines. The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion to grant parole to an "eligible" prisoner. The court of appeals reasoned, however, that, even if the guidelines cannot enhance the judicially-imposed sentence, they may abridge the prisoner's preexisting right to be considered for parole as soon as he is eligible (Pet. App. 60a, 62a, 64a).

The court's reasoning misconceives what it means to be "eligible" for parole. Eligibility simply means that the Commission has *authority* to grant parole; eligibility alone creates no entitlement to or justifiable expectation of parole.[69] Under the statute that existed prior to the adoption of the guidelines, and under the new Act as well, the Commission has been given essentially complete discretion to determine whether an "eligible" prisoner should be released on parole. The greater articulation of the components of this discretion in the new Act did not alter the fact that the Commission's determination to grant or deny parole is "committed to agency discretion." 18 U.S.C. 4218(d). See also note 62, *supra*. While "the 1976 standards may have announced an emphasis

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[69] Indeed, as we contend in *Greenholtz* v. *Inmates*, No. 78-201, argued Jan. 17, 1979, eligibility for parole does not create a legitimate claim of entitlement to release. Much of our reasoning in *Greenholtz* is applicable to this case as well, and we have furnished a copy of our brief in *Greenholtz* to counsel for respondent.

on certain parole release considerations, * * * they did not abridge the Commission's authority to emphasize others within its discretion." *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 699. Under the new Act as well as the old, "[p]arole is neither a matter of right for the inmate nor a matter of grace for the state, it is a matter of administrative discretion." S. Rep. No. 94-369, *supra*, at 19.[70]

Because of this, if the Commission chooses to exercise its discretion to not grant parole to an "eligible" prisoner—or even to a category of "eligible" prisoners—these prisoners are not being deprived of their right to be considered for parole when "eligible." Instead, even though they are "eligible," the Commission has exercised its discretion to deny them parole. Prisoners are not, and never were, entitled to more. Thus, even if we assume that in some contexts the

[70] See 121 Cong. Rec. 15702 (1975) ("we do not weaken or change or liberalize the standards applied by the Commission whether or not the individual is released") (remarks of Rep. Kastenmeier, chairman of the responsible subcommittee); 121 Cong. Rec. 15710 (1975) ("[T]he standards which the [Commission] will be applying if this bill is enacted, will be identical to the standards which the [Commission] relies on now. They will look at a prospective parolee's past history and behavior in the prison and determine: First. Has the inmate observed the rules of the institution? Second. Will he be able to remain at liberty without committing further criminal acts Third. Will his release deprecate the seriousness of the offense so as to undermine society's respect for the law? Fourth. Will his release be compatible with the welfare of society If, in the opinion of the [Commission], a prisoner can meet all of these criteria, he will be released. This is the way the system works now; but, as the system is currently administered, the [Commission] need not explain its actions to anyone * * *.") (remarks of Rep. Gude).

guidelines categorically defer parole beyond the "eligibility" date for a particular offender (an assumption that we dispute below), the Commission's choice to exercise its discretion in this fashion would not increase the punishment for the offense nor deprive the prisoner of any preexisting right.[71] See *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 698-699.

Neither *Lindsey* v. *Washington*, 301 U.S. 397 (1937), nor *Warden* v. *Marrero*, 417 U.S. 653 (1974), on which the court of appeals relied (Pet. App. 57a-59a), undermines our submission. In *Lind-*

[71] Respondent has suggested (Br. in Op. at 15) that the customary release dates under the guidelines "bear no relation to the 'customary length of imprisonment' served prior to adoption of the guidelines." None of the sources that describe the formulation of the guidelines supports respondent's assertion. Indeed, it has been reported by those involved in the establishment of the guidelines that the customary parole practice of various offender categories prior to the adoption of the guidelines was one of the principal factors used in determining appropriate customary release dates. See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime & Delinquency 34, 38-39 (1975); Hoffman & Gottfredson, *Paroling Policy Guidelines: A Matter of Equity* 10 (NCCD Supp. No. 9, 1973). Respondent acknowledged in his complaint (A. 13, para. 42) that the guidelines' release dates are derived in large measure from previous parole practice.

In any event, even if the Commission were exercising its broad discretion in a manner that altered median release dates, that would not constitute an ex post facto enhancement of sentences. The prisoner's *eligibility* for parole is not altered by the Commission's choice to exercise its statutory discretion in one of two alternative ways. In either situation the prisoner is only "eligible" to be paroled in the exercise of the Commission's discretion. The discretion has been unaltered.

sey the Court held that the Ex Post Facto Clause barred application of a statute altering the punishment for a particular crime to conduct occurring before the amendment was enacted. The amendment changed the maximum sentence for the crime from a range of 5 to 15 years to a mandatory sentence of 15 years' imprisonment. As the Court subsequently explained in *Dobbert* v. *Florida*, *supra*, 432 U.S. at 300, although Lindsey "received a sentence under the new law which was within permissible bounds under the old law," the defect in the new statute was that it had "totally eliminated" all discretion for the court to impose a lighter sentence.

The rationale of *Lindsey* is not applicable to this case. The guidelines do not remove the Commission's statutory discretion to consider a prisoner for parole and to release him as soon as he becomes eligible. It was not the *exercise* of discretion to impose a severe penalty that was objectionable in *Lindsey*; rather, it was the statutory removal of a preexisting discretion to impose anything else.[72] *Dobbert* v. *Florida*,

[72] For example, there would have been nothing objectionable in *Lindsey* if the statute had not been amended to remove the sentencing court's discretion and the court had merely concluded, in the exercise of its discretion, that a particular criminal should receive the maximum term of 15 years, even though the court had previously sentenced similar offenders to only 5 to 10 years. In the exercise of its statutory sentencing discretion, the court may revise over time its assessment of the needs of deterrence and retribution. It may thus give lesser or greater sentences to different, though similarly situated, offenders. This is justifiable because each offender is entitled only to the exercise of the

supra, 432 U.S. at 300. It makes no sense to say that the Commission has eliminated its discretion by exercising it. This is especially so because the Commission has retained authority to revise or modify its guidelines whenever appropriate. 28 C.F.R. 2.20 (g).

Warden v. *Marrero* also is consistent with this conclusion. In that case the Court stated in *dicta* that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause * * * of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the * * * offense.'" 417 U.S. at 663 (emphasis in original), quoting *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905). For the reasons we have already discussed, the guidelines do not alter any prisoner's statutory "parole eligibility." A prisoner who is "eligible" for parole is entitled to be considered for parole, not to be paroled. If the Commission determines after applying its guidelines not to parole a prisoner at his initial eligibility, he has not been

court's statutory discretion, and not to any particular sentence within the statutory limits.

Similarly, the Parole Commission may revise its discretionary judgments over time—because of either changing membership or changing assessments of the statutory parole criteria—concerning the appropriate period of incarceration before sentenced prisoners of various categories should ordinarily be released. The prisoners are entitled to the exercise of the Commission's discretion, not to release on parole at any particular date within the eligibility period.

"deprive[d] * * * of the right to be found qualified." *Greenfield* v. *Scafati*, 277 F. Supp. 644, 646 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968). He has simply been found not to be qualified.

B. The Parole Guidelines Do Not Deprive Prisoners Of The Possibility Of More Lenient Parole Decisions

The guidelines do not categorically defer parole beyond the initial date of eligibility for any individual prisoner or class of prisoners. The guidelines provide a range of customary release dates for various offender and offense categories and do not restrict the Commission's discretion to select any particular date within those broad ranges.[73] In many cases (obviously depending on what length of sentence has been imposed), a prisoner's initial parole eligibility date will fall within these customary release ranges. More importantly, however, the Commission may consider a prisoner for release at a date outside the guideline ranges in any appropriate case. For example, where there are mitigating circumstances relating to a particular offense, the Commission may rate the prisoner's offense at a different severity than the normal guideline rating. 28 C.F.R. 2.20(d). Similarly, where the circumstances warrant, a prisoner may be given a different parole prognosis rating than would ordinarily be established under the guidelines. 28 C.F.R. 2.20(e). Furthermore, the Commission has made clear that the guideline release "ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered." 28 C.F.R. 2.20(c). The guidelines thus constitute "procedural guideposts"; they are not binding on the agency and do not "have the characteristic of [a] law" subject to the limitations of the Ex Post Facto Clause. *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 698 & n.5; *Ruip* v. *United States*, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). See also *Shepard* v. *Taylor*, 556 F.2d 648, 654 (2d Cir. 1977).[74] Although the guidelines provide a frame-

[73] The customary release range for a "low" offense severity and "very good" offender prognosis is 6-10 months. The greater end of this range exceeds the smaller by approximately 67%. The customary release range for a "greatest" offense severity and "poor" offender prognosis is 85-110 months. The greater end of this range exceeds the smaller by approximately two years, or 29%. See 28 C.F.R. 2.20 (table).

[74] *Rodriguez* v. *United States Parole Commission*, *supra*, held that the principles underlying the Ex Post Facto Clause were violated by the denial of a parole review hearing at the one-third point of a prisoner's sentence, where such a hearing would have been held under practices required by law at the time sentence was imposed. We disagree with the analysis of *Rodriguez*, but even that court noted (slip op. 12 n.9) that its decision was not inconsistent with the conclusion of the court in *Ruip* v. *United States*, *supra*, 555 F.2d at 1335, that the guidelines are merely "guideposts which assist the Parole Commission in exercising its discretion."

Similarly, in *Shepard* v. *Taylor*, *supra*, the Second Circuit held that the retroactive application of a statute that substantially altered the criteria for parole of persons sentenced under the Federal Youth Corrections Act was prohibited under the Ex Post Facto Clause. But in the case of an adult offender, the court stated, the guidelines do not constitute impermissible ex post facto laws because "they merely clarify the exer-

work for the fair and consistent application of parole policy, they do not remove the possibility of substantially more lenient treatment where the Commission concludes that the circumstances warrant it.[75]

Despite the evidently broad authority reserved by the Commission to make decisions independently of the guidelines, the court of appeals concluded that the Commission's practice under the guidelines would have an impermissible ex post facto effect if it were shown that less than 60% of decisions were made outside the guidelines (Pet. App. 64a). This conclusion was apparently based on the court's belief that prior parole practice had produced substantially more varying results (*i.e.*, that parole was granted erratically) and that each prisoner sentenced prior to adoption of the guidelines is entitled to a continuation of the prior, more disparate parole practice. This

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cise of administrative discretion without altering any existing considerations for parole release." 556 F.2d at 654.

[75] 18 U.S.C. 4206(c) does not remove this discretion by directing the Commission to make decisions outside the guidelines only when there is "good cause" for doing so. The determination of "good cause" in particular cases is an element of parole decisionmaking that is committed to the Commission's discretion. See 18 U.S.C. 4218(d); S. Conf. Rep. No. 94-648, *supra*, at 25, 36; H.R. Conf. Rep. No. 94-838, *supra*, at 25, 36. In making this determination, the Commission may rely on any factor that is "not arbitrary, irrational, unreasonable, irrelevant or capricious." *Id.* at 27. Although Congress expected the Commission to act within the guidelines in most cases in order to achieve "more uniformity and greater precision in the grant or denial of parole," *ibid.*, the Commission remains free to reach determinations in individual cases outside the guidelines in the exercise of its discretion.

analysis, however, simply makes no sense. Although each "eligible" prisoner may be entitled to a reasoned exercise of discretion, he is not (and never was) "entitled" to an arbitrary parole decision. As we have shown above, if the Commission exercises its discretion to obtain fairer, more uniform, and less arbitrary decisions, that does not deprive any prisoner of his right to a discretionary decision.

Moreover, it is difficult to imagine what class-wide or individual remedy the court could direct if its analysis were correct. The guidelines themselves cannot be invalid under the court's theory, because the guidelines leave substantial room for the Commission to reach results outside the customary release ranges. 28 C.F.R. 2.20(b), (c), (d), (e), (g). A class-wide order directing the Commission to apply its guidelines "less frequently" would be useless to any class member.[76] Furthermore, no individual remedy is likely to be appropriate, because it is not possible to

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[76] As we have shown at pages 51-74, *supra*, there is no basis for a requirement, under either the new Act or the old, that the Commission consider sentence length in parole decisions. See also *Battle* v. *Norton*, 365 F. Supp. 925, 931 (D. Conn. 1973). Offense severity and offender characteristics have been emphasized as important parole considerations by the Commission since at least the 1950s. See, *e.g.*, Federal Judicial Center, *Deskbook for Sentencing* V6-7 (1962); Remarks of Richard A. Chappell, Chairman of the Board of Parole, at the November 1964 Institutes on Sentencing, *Federal Parole*, 37 F.R.D. 207, 210 (1964); Board of Parole, *Biennial Report* 22 (1970); Richardson, *Parole and the Law*, 2 National Probation and Parole Association Journal 27 (1956).

determine in any one case whether a prisoner denied parole under the guidelines would have received a more favorable parole disposition under former practice.[77] This emphasizes the error in the court's analy-

[77] The guidelines may change many release decisions by bringing all release decisions closer to the norm. But this does not help a court to determine whether any particular prisoner would have been released differently absent the guidelines, especially since the guidelines are based on prior parole practice. See pages 55-58, *supra*.

Statistics prepared by the Commission's staff show that the implementation of the guideline system has not extinguished any previously-existing substantial probability of release. During 1966 to 1970, 54.5% of all adult prisoners (and 59% of all adult prisoners serving regular sentences) were held in jail until the expiration of their sentences. Board of Parole, *Biennial Report* 20 (1970). In other words, some 60% of persons situated similarly to respondent never received parole. This is consistent with the understanding of the Conference Committee in 1976, which reported that "approximately 35 per cent of all Federal offenders who are released, are released on parole." S. Conf. Rep. No. 94-648, *supra*, at 19; H.R. Conf. Rep. No. 94-838, *supra*, at 19.

Other data compiled from the independent study of the National Commission on Crime and Delinquency show that in 1970 and 1972, of persons who received sentences (exceeding one year) under 18 U.S.C. 4205(a), 20.5% were released within two months of the one-third point of their sentences, 16.9% were released sometime after then but before mandatory release on good time credits, and 62.6% were held until mandatory release. The Commission's current data show that, of adult prisoners sentenced under the statute who were granted initial parole hearings from October 1977 to March 1978, 18.7% were released at or soon after one-third, 22.5% after then, and 58.8% held until mandatory release.

Of prisoners sentenced under 18 U.S.C. 4205(b)(2), 23.0% were released in 1970 and 1972 at or within two months of the one-third point, 27.4% were released after then, and

sis: because the court cannot insist that the Commission exercise its discretion to reach one particular result or another in any individual case, the court also cannot direct the Commission to reach arbitrarily different results in similar cases.

49.7% were held until mandatory release. Those prisoners who had initial parole hearings from October 1977 to March 1978 fared as follows: 19.4% released at or soon after one-third, 35.9% released later, and 44.8% held until mandatory release. These figures show that, while more prisoners now are being denied parole at the one-third point than was the case prior to the implementation of the guidelines, a higher percentage of prisoners is now being paroled before the mandatory release date.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals with instructions that it be dismissed as moot. If the Court concludes that the case is not moot, it should reverse the judgment of the court of appeals and remand with instructions that the complaint be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted.

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